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The Supreme Court of Pennsylvania, in the recent case of Hysong v. School District, considered an interesting question of ethics as well as law. The problem was whether the election of Catholic teachers in the public schools of the State is or is not a violation of law. The court held in the negative, though there was a dissent by one member of the court. The majority of the court held that the selection of such teachers by the school directors is a matter of discretion, and that from the fact that a board composed of Catholics has elected a majority of Catholic teachers the court will not infer that the board has unlawfully discriminated in favor of Catholics; that it is not sectarian teaching and therefore not unlawful for the directors to employ nuns of a certain Catholic order to teach in the public schools, who appear in the schools in the peculiar ecclesiastical robes of their religious order and are hung with rosaries and other devices peculiar to their church, and who act while teaching as representatives of their religious order and have the pupils instructed to call them "Sisters." Judge Dean, in the course of a well written opinion, says that "in the sixty years of the existence of our present school system, this is the first time this court has been asked to decide as a matter of law that it is sectarian teaching for a devout woman to appear in a school-room in a dress peculiar to a religious organization of a Christian church. We decline to do so; the law does not say so. The legislature may, by statute, enact that teachers shall wear in the school-room a peculiar style of dress, and that none other shall be worn, and thereby secure the same uniformity of outward appearance that we now see in city police, railroad trainmen and nurses in some of our large hospitals."

Judge Williams delivered a vigorous dissenting opinion to that part of the opinion of the court relating to dress and the regalia of teachers, in which he says, in speaking of the dress of the nuns, "This is strikingly unlike the dress of their sex, whether Catholic or Protestant. Its use at all times and in all places is obligatory. They are forbidden to modify it. Wherever they go this garb proclaims their church, their order, and their separation from the secular world as plainly as a herald could do if they were constantly attended by such a person. The question presented on this state of facts is, whether a school that is filled with religious or ecclesiastical persons as teachers, who come to the discharge of their daily duties wearing their ecclesiastical robes and hung about with the rosaries and other devices peculiar to their church and order, is not necessarily dominated by sectarian influences and obnoxious to the spirit of the constitutional provisions and the school laws? This is not a question about taste or fashion in dress, nor about the color or cut of a teacher's clothing. If it was only this I would favor the largest liberty. It is deeper and broader than this. It is a question over the true intent and spirit of our common school system as disclosed in the provisions referred to."

We learn from the newspapers that the question whether or not a cat is such property as can be the subject of larceny is now agitating the legal profession of Baltimore and is likely to lead to a litigation that may be carried to the appellate court before it is finally determined. A cat belonging to a Mrs. M was found in the possession of one F who refused to surrender it. A police justice then issued a warrant for the arrest of F on the charge of larceny and he was actually arrested and kept in custody a day or two, before the idea began to dawn upon the magistrate's mind that cat stealing is not a criminal offense. The *Baltimore Sun* published the opinions of four lawyers on the subject—two holding one way and two the other; but the attorney-general of the State gave his opinion that a cat is not property and cannot therefore in a legal sense be stolen. The police justice therefore released the prisoner, who now has brought an action to recover damages for false imprisonment, and if the case shall go to the court of last resort it may take the learning of the highest tribunal in the State to decide the important question involved. Dogs and cats were said at common law to have no intrinsic value and could not therefore be the subject of

larceny; but it is now otherwise in England and in some of the United States by statute. It was held, however, in Massachusetts before the passage of any such statute that the owner of a dog had such property in him that he might maintain an action of trespass for injury to the animal, or of trover for a conversion; and there is good authority in the old law books (Coke, Bacon, Comyns, Croke, etc.) for the doctrine that "a man may have property in some things which are of so base a nature that no felony can be committed of them; as of a bloodhound or mastiff." In the State of New York, dogs appear to be deemed subjects of larceny, in consequence of a statute giving to them the character of property, but we believe there is no such law in regard to cats. Blackstone, Kent, and other high legal authorities make the distinction that it is as much a felony to steal such animals *ferœ naturæ* as are fit for food as to steal tame animals; but not so if they are kept only for pleasure, curiosity or whim, as dogs, bears, cats, parrots, singing birds, etc.; because their value is then not intrinsic, but depends upon the caprice of the owner, though the taking is such an invasion of property as may amount to a civil injury and be redressed by a civil action. According to this the question naturally arises whether it might not be larceny to steal the cat of a Chinaman, who is said to use cats for food, while it would not be larceny to steal the cat of an American who does not eat cats.

NOTES OF RECENT DECISIONS.

DEATH BY WRONGFUL ACT—LIMITATIONS—CONFLICT OF LAWS.—The United States Circuit Court of Appeals for the Eighth Circuit decide in Theroux v. Northern Pac. Ry. Co., 64 Fed. Rep. 80, that an action for death by wrongful act, occurring in a State which gives three years for suing therefor may be maintained in another State, which gives only two years at any time within three years. The following is from the opinion of Thayer, J.:

It was held in Boyd v. Clark, 8 Fed. Rep. 849, which is a leading case on the subject, that when a statute of a State or country gives a right of action unknown to the common law, and in conferring the right, limits the time within which action may be brought, such limitation is operative in any jurisdiction where it is sought to enforce such cause of action. The same doctrine was recognized and approved in the following cases: The Harrisburg, 119 U. S. 199, 214, 7 Sup. Ct. 140; Munos v. Southern Pac. Co., 2 U. S. App. 222, 2 C. C. A. 163, 51 Fed. Rep. 188; Eastwood v. Kennedy, 44 Md. 563; Railway Co. v. Hine, 25 Ohio St. 629, and O'Shields v. Railway Co., 83 Ga. 621, 10 S. E. Rep. 268. Indeed, it may be said that cases of the kind last referred to form a well established exception to the general doctrine that the *lex fori* governs in determining whether a cause of action is barred by limitations. An attempt is made to distinguish the case at bar from Boyd v. Clark, *supra*, and to exempt it from the operation of the rule declared in that case an effort was made to enforce a statutory cause of action in a foreign jurisdiction after it had ceased to be enforceable in the country by whose laws the right of action was given; whereas in the case at bar the effort is simply to bar a statutory cause of action, when sued upon in a foreign State, by applying thereto the local limitation law which is applicable to similar causes of action when they originate within the State. We recognize the obvious difference between the two cases, but we think that it will not suffice to withdraw the case in hand from the operation of the rule enunciated in Boyd v. Clark, and in the other cases heretofore cited. It was said, in substance, by Mr. Chief Justice Waite, in The Harrisburg, *supra*, that when a statute creates a new legal liability with the right to sue for its enforcement within a given period, and not afterwards, the time within which suit must be brought operates as a limitation of the liability, and not merely as a limitation of the remedy. The same thought was expressed by the Supreme Court of Ohio, in Railway Co. v. Hine, *supra*, and by the Supreme Court of Maryland, in Eastwood v. Kennedy, *supra*. In the Ohio case it was said that a *proviso* contained in a statute creating a new cause of action, which limits the right to sue to two years, is a condition qualifying the right of action, and not a mere limitation of the remedy. It must be accepted, therefore, as the established doctrine, that where a statute confers a new right, which by the terms of the act is enforceable by suit only within a given period, the period allowed for its enforcement is a constituent part of the liability intended to be created, and of the right intended to be conferred. The period prescribed for bringing suit in such cases is not like an ordinary statute of limitations, which merely affects the remedy. It follows, of course, that if the courts of another State refuse to permit the cause of action to be sued upon during a part of the period limited by the foreign law, to that extent they refuse to give effect to the foreign law, and by so doing impair the right intended to be created. Doubtless, the courts of a State may refuse to enforce a liability unknown to the common law that has been created by the laws of a foreign State or country, but the rule of comity which prevails as between the various States of this Union requires that the courts of each State shall enforce every civil liability that may have been created by the laws of other States, for an act done or omitted within their several territorial jurisdictions, unless the liability so created and sought to be enforced is clearly repugnant to some local law, or is opposed to some well established public policy of the State whose courts are asked to enforce it (Railroad Co. v. Mase [decided by this court at the present term], 63 Fed. Rep. 114; Railroad Co. v. Babcock, 154 U. S. 190, 14 Sup. Ct. Rep. 978, and cases cited). In point of fact, nearly every State in this Union has now adopted the provisions of Lord Campbell's act, with

slight variations; and we are not aware that the courts of a single State have ever refused to entertain a suit founded on the provisions of that act, as adopted in a sister State, or to give all the provisions of the act full force and effect, where the wrongful act or omission of duty complained of was committed in the latter State. Such being the rule of comity which is generally recognized and enforced, we do not see how the courts of Minnesota, and much less a Federal Court sitting in Minnesota, can well refuse to enforce a liability created by the laws of Montana for a wrongful act or omission of duty resulting in death, which was committed in Montana within three years, and more than two years prior to the institution of the suit, merely because the laws of Minnesota provide, with respect to similar acts committed in Minnesota, that suit shall be brought within two years. To refuse to entertain such a suit within three years would be to subtract from the liability and to impair the right intended to be conferred by the laws of Montana; for the period allowed in which to enforce the liability, as we have before shown, is a substantial part of the liability imposed and of the right intended to be created Moreover, it cannot be said that, by entertaining the suit after the lapse of two years, the laws of Minnesota would be set at naught, or any well defined public policy of that State violated; for, in contemplation of law, the two year limitation prescribed by the statute of that State (chapter 77, sec. 2, *supra*), was only intended to apply, and can only apply, to causes of action which originate in that State, and not to cause of action that originate elsewhere. We are of the opinion therefore, that the Circuit Court erred in sustaining the motion for judgment on the pleadings.

MUNICIPAL CORPORATION — APPROACH TO BRIDGE—ADDITIONAL SERVITUDE—ABUTTING OWNER.—It appeared in Willis v. City of Winona, 60 N. W. Rep. 814, decided by the Supreme Court of Minnesota that the city of Winona, under express legislative authority, constructed a public wagon bridge across the Mississippi river, the Minnesota end of which reached the river bank near the foot of Main street, and at considerable height above the natural level of the land. For the purpose of connecting the bridge, for the purposes of travel and traffic, with Main and the other public streets, the city constructed an approach in and along the center of Main street, in front of plaintiff's abutting lot. This approach, which consists partly of solid abutments, and partly of a plank way supported by iron columns, gradually ascends from the natural level of the street at one end to the level of the bridge at the other. It was held that the construction and maintenance of this approach does not impose any additional servitude on the street, and does not render the city liable for damage to plaintiff's lot, in the absence of any negligence on part of the city, and of any statute imposing such liability, and that this rule is not changed by the fact that the city, under legislative authority, exacts tolls for the use of the bridge by the public. Mitchell, J., said in part:

Do the construction and maintenance of this bridge approach impose an additional servitude on the street? It can hardly require argument to prove that the bridge itself is a public highway The fact that tolls are exacted for its use by the public, for the purpose of defraying the expense of its construction and maintenance, in lieu of direct taxation for that purpose, does not change its character as a public highway, so long as all persons are entitled to use it as a public thoroughfare. Commissioners v. Chandler, 96 U. S. 205. The bridge is just as much a public highway as is Main street, with which it connects; and whether we consider the approaches as a part of the former or of the latter, it is merely a part of the highway. The city having, as it was authorized to do, established a new highway across the Mississippi river, it was necessary to connect it, for purposes of travel, with Main and the other streets of the city. This it has done, in the only way it could have been done, by what, in effect, amounts merely to raising the grade of the center of Main street in front of plaintiff's lot. It can make no difference in principle whether this was done by filling up the street solidly, or, as in this case, by supporting the way on stone or iron columns. Neither is it important that the city raised the grade of only a part of the street, leaving the remainder at a lower grade. The facts that it required authority from the United States and the State of Wisconsin, as well as of Minnesota, to empower the city to build a bridge across the Mississippi, or that such bridge extended beyond the city limits, are wholly immaterial, so long as the city kept within the authority conferred upon it. Had the authority been to tunnel under the river, and the approach had been made by cutting down the grade of a part of Main street, the principle would have been exactly the same. The doctrine of the courts everywhere, both in England and in this country (unless Ohio and Kentucky are exceptions), is that, so long as there is no application of the street to purposes other than those of a highway, any establishment or change of grade made lawfully, and not negligently performed, does not impose an additional servitude upon the street, and hence is not within the constitutional inhibition against taking private property without compensation, and is not the basis for an action for damages unless there be an express statute to that effect. That this is the rule, and that the facts of this case fall within it, is too well established by the decisions of this court to require the citation of authorities from other jurisdictions. Lee v. City of Minneapolis, 22 Minn. 13; Alden v. City of Minneapolis, 24 Minn. 254; Henderson v. City of Minneapolis, 32 Minn. 319, 20 N. W. Rep. 322; Yanish v. City of St. Paul, 50 Minn. 518, 52 N. W. Rep. 925. See, also, Transportation Co. v. Chicago, 99 U. S. 635; Selden v. City of Jacksonville, 28 Fla. 558, 10 South. Rep. 457. The New York Elevated Railway Cases cited by plaintiff are not authority in his favor, for they recognize and affirm the very doctrine that we have laid down (Story v. Railroad Co., 90 N. Y. 184), but hold that the construction and maintenance on the street of an elevated railroad operated by steam, and which was not open to the public for purposes of travel and traffic, was a perversion of the street from street uses, and imposed upon it an additional servitude, which entitled abutting owners to damages. Neither does the Adams Case, 39 Minn 286, 39 N. W. Rep. 629, aid the plaintiff, for that case proceeds upon the proposition

that the construction and maintenance of an ordinary commercial railway upon a street is the imposition of an additional servitude. Plaintiff also cites numerous cases as to what constitutes a "taking" of private property. The law of those cases is unquestioned. There is no doubt that the acts of the city would amount to a taking of plaintiff's property, so as to entitle him to compensation, provided the use made of the street by the city imposed an additional servitude upon it, but that is the very question in the case.

Our conclusion is that construction and maintenance of this bridge approach did not impose any additional servitude upon the street, but was a proper street use, and hence constitutes no basis for an action in favor of plaintiff for damages. The common-law rule often works hardship, and this has often led to legislative action changing it in some respects, particularly in case of a change of a previously established street grade; but there is no general statute, and we are cited to no special one, imposing any liability on the city of Winona in such cases, and the doctrine is too well established to warrant the courts to ignore or change it.

RIGHTS OF DIVORCED WIFE—ALIENATION OF HUSBAND'S AFFECTION.—In Clow v. Chapman, 28 S. W. Rep. 328, the Supreme Court of Missouri holds that under the married woman's act (Rev. St. § 6869), providing that all property, including rights in action, belonging to any woman at her marriage, or thereafter acquired, or which have grown out of any violation of her personal rights, shall be her separate property, and she may, in her own name, and without joining her husband, maintain an action for the recovery, with the same force and effect as if she were a *feme sole*, a divorced wife has an action against third persons for alienating the affections of her husband. Black, C. J., says:

The common law gives a husband an action for damages against a third person for enticing away his wife, and depriving him of her society. Schouler, Husb. & W. § 64. Proof of pecuniary loss is not necessary to sustain such an action, because the action is based upon loss of the companionship and society of the wife. Rinehart v. Bills, 82 Mo. 534; Bigaouette v. Paulet, 134 Mass. 125. The question we are now called upon to determine is whether a wife has a corresponding action against third persons for the alienation of the affections of her husband, and depriving her of his society. It seems to be very generally held in this Union that the common law gives her no such action, though this question is left in much doubt in England by the conflicting opinions in Lynch v. Knight, 9 H. L. Cas. 577. It is held in Duffies v. Duffies, 76 Wis. 374, 45 N. W. Rep 522, that a married woman has no such action, either at common law or under the statute of that State. The statute there considered gave the wife an action for any "injury to her person or character." On the other hand, a number of well-considered cases in the courts of different States affirm the right of a married woman to maintain an action against third persons for enticing her husband away, and depriving her of his aid, comfort, and society. Bennett v. Bennett, 116 N. Y. 584, 23 N. E. Rep. 17; Foot v. Card, 58 Conn. 1, 18 Atl. Rep. 1027; Westlake v. Westlake, 34 Ohio St. 621; Seaver v. Adams (N. H.), 19 Atl. Rep. 776; Postlewaite v. Postlewaite, 1 Ind. App. 473, 28 N. E. Rep. 99; Bassett v. Bassett, 20 Ill. App. 544; Mehrhoff v. Mehrhoff, 26 Fed. Rep. 13. There is considerable diversity in these cases as to the grounds upon which the judgments are made to stand. In Bennett v. Bennett, it is held a wife had a right to such an action by the common law, but the right could only be enforced by joining her husband in the suit; that the Code of that State gives her the right to sue in her own name, so that she may now prosecute such a suit for her own benefit. Westlake v. Westlake is made to stand on the ground that, while the right of the wife to maintain such an action at common law may be doubtful, all doubts are resolved in her favor by the statute laws of that State, which provide that all rights in action which "have grown out of a violation of any of her personal rights" shall remain her separate property, and under her sole control. It is also held in that case that the benefit which a wife has in the society of her husband is equal to that which he has in her society. In Seaver v. Adams, the court recites the substance of the various legislative enactments of that State on the subject of married women; placing a married women upon an equality with her husband in respect of property, torts, and contracts, and conferring upon her the right to sue and be sued. It is then said: "And as the only reason why the wife formerly could not maintain an action for the alienation of her husband's affections was the barbarous common-law fiction that her legal existence became suspended during the marriage, and merged into his, which long since ceased to obtain in this jurisdiction, there remains not the semblance of a reason, in principal, why such an action may not be maintained here." Such are the grounds upon which some of the cases sustain the wife's action for damages in the class of cases now in question. We find it stated by one author that the wife cannot maintain such an action at common law, or under a statute, save where the statnte clearly enables her to prosecute such a suit. Schouler, Husb. & W. § 65. On the other hand, it is said: "To entice away, or to corrupt the mind and affections of, one's consort, is a civil wrong for which the offender is liable to the injured husband or wife." Bigelow, Torts, 153. Cooley says in the text, "It is also generally supposed that the wife can have no action against one who should seduce the husband's affections from her, or in any manner deprive her of his care and society;" but in a note he says, "We can see no reason why such an action should not be supported where, by statute, the wife is allowed, for her own benefit, to sue for personal wrongs suffered by her." Cooley, Torts (2d Ed.) 267.

We may now bring in contrast the *status* of a married woman in respect to her personal rights under the common law and our statutes, and first as to the common law. "By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during marriage, or at least is incorporated and consolidated into that of the husband." 1 Bl. Comm. 442. And as to the many disabilities of the wife, following from this principle of unity, the great commentator says they are, "for the most part, intended for her protection and benefit; so great a favorite is the female sex of the laws of England." *Id.* 445. According to the statute law of this State, a husband cannot convey any interest of his wife in her real estate, or the rents and profits thereof, save by deed executed by her as well

as by himself. He is not liable for the debts of his wife, incurred by her before marriage. All real estate and personal property, including rights in action belonging to her at her marriage, or thereafter acquired, or due as the wages of her separate labor, "or have grown out of any violation of her personal rights, shall be and remain her separate property and under her sole control;" and she may "in her own name and without joining her husband as a party plaintiff, institute and maintain any action for the recovery of any such personal property, including rights in action as aforesaid, with the same force and effect as if such married woman was a *feme sole*." We omit reference to statutes enacted after the present cause of action accrued. Now, the common law prevails in this State, except in so far as it has been modified by statute. Let it also be conceded that by the commno law the wife could not maintain a suit against third persons for depriving her of her husband's comfort and society, because her legal existence became merged in that of the husband by the marriage. The case then turns upon the effect to be given to these statutes. They are disabling to a large extent, so far as they apply in terms to the husband, and they are enabling in so far as they apply to the wife. They give her an entirely different standing from that occupied by her at common law. Her position is now more like that of a wife under the civil law. Instead of her legal existence being suspended, as incorporated and consolidated into that of her husband, she is made to stand out in bold relief, with a separate and distinct legal existence as to her property, and also as to her personal rights; and she may enforce all such rights by proceedings in her own name, independently of her husband. She is placed upon an equality with her husband in many, and indeed most, respects. By force of the marriage contract, husband and wife are each entitled to the society and comfort of the other,—the one to as great an extent as the other. As a wife is now placed on an equality with her husband in respect of her property and personal rights, and as a husband may have his action, as against a third person, for enticing away his wife, the wife has her action against third persons for enticing away her husband. This conclusion has, in our opinion, the support of the great weight of authority and the better reason.

But it is insisted on behalf of the defendant that the statutes of this State, before set out, do not confer upon the wife any new rights; that the personal rights mentioned in these statutes are the personal rights which she had at common law; that disabilities are removed, but no new rights are created, and, as she had no right of action at common law to remedy a wrong like the one in question, she has none under the statute law. There is, at first blush, some force in the argument, but upon consideration we consider it no more than adhering to a barren technicality. The statutes, when considered in their full scope and purpose, give the wife a separate legal existence, whereas before her legal existence was considered merged into that of her husband, and for this reason and no other she could not maintain the action. New rights and new obligations necessarily arise from the changed condition, as incidents thereto. When she is given the sole control of her personal property, and the right to recover the same by her own suit, it must follow, as an incident, that she has the right to make contracts in respect of such property, though the statute may not, in terms, give her the right to make contracts in relation thereto. Full dominion over her property carries with it the power to dispose of such property, as a necessary incident. So new personal rights and obligations flow to her because of the fact that she is given a separate and distinct legal existence. Besides all this, the words of the statute, "personal rights," are very comprehensive. They are the same words found in the Ohio statute. In the case before cited from Wisconsin, the court approves the Ohio case, because the statute of Ohio uses these comprehensive words. The statutes of this State concerning married women are for the most part remedial, and should be construed and administered so as to give effect to their general object and purpose.

NEGLIGENCE OF AGENT — LIABILITY FOR DAMAGES.—It is held by the Appellate Court of Indiana in Dean v. Brock, 38 N. E. Rep. 829, that an agent in charge of a building, who fails to make necessary repairs, is not liable to a tenant injured by such failure. The court says:

The contention of counsel is that the Cattersons, who were the agents of William P. Brock, were guilty of negligence in failing to make this building safe for the use for which it was intended; that "their negligence was misfeasance, and not mere non-feasance." We think counsel's contention untenable. An agent, while obeying the command or performing the service of the principal, is not justified in committing a tort; and, if he does, not only the principal, but the agent, may be made to answer in damages therefor. But where a duty rests on the principal, and not on the agent, its non-performance by the latter creates no liability against him, if injury results. True, he may owe a duty to the principal to faithfully discharge his duties as agent; but he owes no duty to others, except that in the performance of those duties he shall not do anything which will cause injury to them. If the agent fails to perform a duty which he owes to the principal, and by reason of such non-performance or neglect of duty a third person sustains injury, no action can be maintained against the agent by such third person on account thereof. Mecham, Ag. 589; Bish. Non-Cont. Law, § 595; Crandall v. Loomis, 56 Vt. 664; 1 Am. and Eng. Enc. Law, 406, and cases cited. Great confusion has apparently crept into many cases from a failure to observe the proper distinction between non-feasance and misfeasance. Non-feasance is the failure to do that which one, by reason of his undertaking, and not because imposed upon him as a legal duty, agrees to do for another; that which is imposed upon him merely by virtue of his relation to his principal. Misfeasance, on the contrary, may consist in failing to do that which is imposed as a duty, or in doing for another in an improper manner that which the principal ought to have done. As of the latter class would be where an agent actually undertakes and enters upon the performance of a certain work for the principal, in the execution, of which it is his duty to use reasonable care in the manner of executing it, so as not to cause injury to others; and he cannot, by failing to exercise such care, either by performing the work, or by abandoning it in an uncompleted condition, and leaving it unguarded or unsafe, exempt himself from liability to those who may suffer injury by reason of such negligence. Osborne v. Morgan, 130 Mass. 102. This case, however, cannot be said to be one of misfeasance, because the appellees, the Cattersons, were under no legal duty to keep the property in repair, and safe for use. Neither did they, in making the repairs, do so in a negligent

manner. They simply neglected to perform for their principal the duty which he owned to his tenants. Their failure to do so was merely a non-feasance, and not a misfeasance. The cases cited by counsel are all cases where the agent was held liable for misfeasance. In none of those cases did the court hold that the agent was liable for failing to perform a duty owing from the principal to another, who was injured by reason of such neglect of duty. That when an agent owes a duty, and one to whom the duty is owing is injured by reason of the failure to perform such duty, the agent is liable, does not admit of question, for he is liable for the result of his neglect to perform any duty devolving upon him in his individual character. Not so, however, when he is simply the agent of the principal to perform the duty owing from the principal to others. The complaint stated no cause of action against the appellees, the Cattersons. Judgment affirmed.

CRIMINAL LAW — LEWDNESS — COHABITATION.—In Schondel v. State, 30 Atl. Rep. 598, decided by the Supreme Court of New Jersey it was held that if a man and woman live together, under an honest belief that they are legally married, such cohabitation is not indictable under a statute for the punishment of open lewdness. The court said in part:

The contention in behalf of the State is that the divorce that had been obtained in the State of Illinois, while it was valid in that State, had no legal force in this State, inasmuch as the defendant in that proceeding had not been properly brought into court, and consequently, the subsequent marriage of these defendants being invalid, their cohabitation in this State is legally indefensible. Granting these premises, it is a fallacy to infer that, because these two persons had unconsciously committed the crime of bigamy, thereby they had acted lewdly. The case shows that they both believed that they were legally married, and therefore in living together as man and wife they did not in the least degree infringe any moral law whatever; and similarly, when they held themselves out to the public as married persons they did not become moral wrong-doers. They regarded themselves as married, and the public so regarded them; there was no scandal, no unfavorable comment. To assert that such a line of conduct, under the conditions stated, was an exhibition of notorious and open lewdness appears to the court to be a proposition destitute of even a semblance of legality. Most, it not all, of the American adjudications will, when critically examined, be found to accord with the view above expressed The text writers appear to have arrived at the same result. Thus, Mr. Wharton (Criminal Law [9th Ed.] sec 1747) says, treating of the crime of open lewdness: "But this offense is not made out by proof of cohabitation under an honest belief in marriage." The leading cases touching the subject will be found in that most satisfactory of all legal digests, 13 Am. & Eng. Enc. Law, title, "Lewdness." The decision in the case of Com. v. Munson, 127 Mass. 459, is exactly in point. In this instance, as on the present occasion, the defendants had been indicted for lewdness, and it appeared in the proofs that they had been married in a form which they deemed legal. The court, after pronouncing the alleged marriage to be a nullity, disposes of the remaining consideration involved in the prosecution in these words: "But to support this indictment, etc., it is necessary to prove, not only that a man and woman, not being married to each other, cohabited together, but that they so cohabited 'lewdly and lasciviously,' implying an evil intent, which cannot be inferred from the mere fact (such as was proved at the trial) of cohabitation under an honest, though mistaken, belief that the parties were lawfully married to each other."

SURPRISE AS A GROUND FOR RELIEF IN EQUITY TO JUDGMENTS AT LAW.

What is the interpretation and construction of surprise as an equitable question? Judge Story says: When a court of equity relieves on the ground of surprise, it does so on the ground that the party has been taken unawares, and that he has acted without due deliberation, and under confused and sudden impressions. But the true use of it will always be found. that something has been done which was unexpected, and which operated to mislead or confuse the parties on the sudden, and on that account has been deemed a fraud.[1] Cases of surprise are properly referred to the head of fraud or imposition.[2]

In treating the doctrine of surprise as applicable to deeds and agreements: It is not every surprise that will avoid a deed duly made; nor is it fitting; for it would occasion great uncertainty, and it would be impossible to fix what is meant oy surprise; for a man may be said to be surprised in every action which is not done with so much discretion as it ought to be. The surprise here intended must be accompanied with fraud and circumvention,[3] or at least such circumstances as demonstrate the party had no opportunity to use suitable deliberation, or that there was some influence, or management to mislead.[4] If both parties are ignorant of a matter of law, involved in a transaction. it is what is technically called a case of surprise, which it seems is a term for immediate result of a species of mistake, upon which the court will relieve.[5]

[1] Story, Eq. Juris. (11th ed.) p. 118, n., and cites Evans v. Llewellyn, 2 Bro. Chy. 150; Twining v. Morice, *Id.* p 326; Earl of Bath and Montague's Case, 3 Ch. Cas. 56, 74, 103, 114; Irnham v. Child, 1 Bro Chy. 92; Marquis of Townshend v. Stangroom, 6 Vesey, 328.

[2] Story, Eq. Jurisp. (11th ed.) § 251.

[3] 1 Fonb. Eq. book 1, ch. 2, § 8.

[4] Story, Eq Jurisp § 251; *cf.* Dan. Chy. Pr. (5 ed.) 1026, 1027. as to what is a surprise sufficient to vacate the enrollment of a decree.

[5] Jer. Eq. Jurisd. (1st Am. ed.) 366. And see Willan v. Willan, 16 Ves. 82. In this case the agreement was

"I hardly know any surprise that should be sufficient to set aside a deed after a verdict at law, unless it should be mixed up with fraud and proved." And Ld. C. J. Treby: "I confess I am at a loss for the very notion of surprise, for I take it to be falsehood or forgery. I am not satisfied as to any surprise in this case, in anything—the duke was under no force, no restraint, no false information as I observe; nor any solicitation, he was at full liberty, he was under no sickness, no weakness, and he had not been drinking."[6] Where a party is taken by surprise, not having sufficient time to act with caution, and, therefore, though there is no actual fraud, it is something like fraud, for an undue advantage was taken of his situation.[7] It seems that our chancellors strain to do an exact justice, and under the hardships of the cases have pressed this beyond the strict limits of this jurisdiction.[8] Forgetting the words of Lord Redesdale: "It is more important that an end should be put to litigation, than that justice should be done in ever case.[9] There is no ground for relief in equity and a new trial, for inadvertence or mistake as distinguished from accident or surprise.[10]

Is the sickness of attorney or client such surprise as will make an equity for a new trial? On principle, this is not the surprise contemplated, for this can be made known to the court of law as ground for continuance or postponement, either by counsel or client, as the case may be; and be made ground for relief in a case where the court has acted indiscreetly and refuse to postpone or continue. The cases where this question has been discussed are not uniform in their reasoning, and many have an admixture of other equitable questions. Although our great multitude of courts and litigation, few cases comparatively have arisen on this ground of surprise as alleged. Mr. Freeman on Judgments, Sec. 500*a*, says: Illness of a party or his counsel, or accident preventing either from attending court, or doing any act necessary to the defense, may be a sufficient ground for the interposition of equity, provided it appears to have been the cause of the failure to make proper and efficient defense, and the complainant could not by the exercise of due diligence have prevented the injurious consequences of the accident or misfortune, nor obtained adequate relief in original action.[11] Sickness, accident, surprise, and all other causes by reason of which a party, without

decreed to be delivered up, the surprise being neither party understood the effects. *Cf.* Bish. Con., §§ 697, 702, 704.

[6] Earl of Bath and Montague's Case, 3 Ch. Cas. 56, 74.

[7] Evans v. Lewellyn, 1 Cox Ch. Cas. 340, 2 Bro. Chy. 150. Equity will interfere where a party has possessed himself, improperly of something whereby he has an unconscientious advantage. 8 Com. Dig. 63; *cf.* Story, Eq. Jurisp., § 251 (11th ed.); Moore v. Liscomb, 82 Va. 548, 549; Holland & wife v. Trotter, 22 Gratt. 144.

[8] Kersey v. Rash, 3 Del. Chy. 343.

[9] Bateman v. Willoe, 1 Sch. & Le. 204. Owing to inattention of parties and several other causes, exact justice can very seldom be done. *Id.* Judge Story, discussing mistake, says: Many of the case will be found to have turned, not upon a mere consideration of mistake of law, stripped of other circumstances, but upon an admixture of other ingredients, going to establish misrepresentation, imposition, undue confidence, undue influence, mental imbecility, or that sort of surprise which equity uniformly regards as a just ground for relief. Story, Eq. Jurisp. § 120, citing 16 Ves. 82.

[10] Fincher v. Malcomlson, 96 Cal. 38, 30 Pac. Rep. 835.

[11] And he cites the five following cases in support of this principle: Brooks v. Whitson, 7 S. & M. 513. In this case the defendant started to the court but did not reach the court house on account of high water. An attorney, his friend, attempted to put in a plea for absent defendant, to prevent a judgment, but was dissuaded by the parties to the suit making a false statement; a new trial was granted. It seems this was really a case in which there was an actual fraud by opposite parties, and relief could have been given on that ground. In Pharr v. Reynolds, 3 Ala. 521, relief was refused after judgment, although party was sick and had another suit pending against him at same time in another county. The court says: "It was his duty to send an agent to attend to his case, or put his attorney in possession of the facts for a continuance." A defendant was on way to trial and was taken sick, and, consequently, could not appear and make the affidavit necessary to introduce copies of original papers lost. His attorney was present and sought to conduct the case and lost, but relief was granted. Hord v. Dishman, 5 Call (Va.), 279. Entering into a case without an application for a continuance, and being defeated, and then relief in equity and a new trial, seems carrying the doctrine to a great extent. Absence of attorney was held no ground for relief, the court charges the defendant with negligence in not being present at the trial and employing another. Crim v. Handley, 94 U. S. 652. In Clifton v. Livor, 24 Ga. 91, relief was granted on the sickness of the defendant, At the trial the attorney had asked a postponment. which was refused. There was such an abuse by the trial judge, and the case being one of such fraud, that the principle on which it was decided has been questioned. See 3 Del. Ch. 344. In Ricker v. Horn, 74 Me. 289, the plaintiff was sick and absent. The attorney proceeded with the case; there was a surprise in the evidence, but no motion for continuance or postponement. This is similar to the case 5 Call, 279, and both seem opposed to the views expressed in 3 Ala. 521, and 94 U. S. 659.

any fault on his part, is unable to present his defense is relievable in equity.[12]

In all this class of cases of sickness of party or counsel, the better view seems to discourage applications of this nature, as the presumption is the party or counsel might have been present and procured a continuance, and the remedy was at law.[13] This doctrine is laid down by Mr. Freeman[14] and Mr. Spelling.[15] That relief will be granted in cases of surprise if there is no negligence or fault of the complainant or his agents. Our system of procedure, the terms of court and arrangement of dockets, are too well known for any delays in bringing matters for its consideration to the court of law, to be relieved afterwards on a ground of surprise; for it may be said there is no surprise but what might reasonably have been anticipated, and no ground of relief.[16] But if the court should proceed in an unusual manner, and not as the usual practice, without any notice to defendant, then there should be relief.[17] Equity should interfere with judgments at law with extreme caution,[18] and the jurisdiction, though unquestioned, is one from which the pressure of hardship, always an element in these cases, is liable to abuse.[19] The relief in equity has the effect of granting a new trial, to a matter already tried at law, and should be confined strictly to cases of fraud and unavoidable accident or mistake, which, if not relieved, will be a palpable hardship and injustice,[20] and a party should not be deprived of his judgment at law, unless against conscience, and the complainant must show that he has more equity than he who has gained at law.[21] The high powers entrusted to chancery to promote the purposes of justice should not be abused to the vexation of the citizens, and the unsettling, solemn decisions of other courts where it is always to be presumed full justice has been done.[22] The degree of care and attention necessary to ensure relief in a meritorious case must be without limit. The complainant must show that no degree of care and diligence could have prevented the fault, and he must use every effort to ascertain his case and its bearings before the trial, and leave no steps to make it effectual at the trial.[23] A

[12] Freeman on Judg. § 500, *a*, citing in support 7 Hump. 39; 5 Gratt. 645; 3 Del. Chy. R. 321. In Rice v. Bank, 7 Humph. 39, the defendant was sick at the time summons was served on him, and too sick to attend to business and for a long time thereafter. The court has no doubts on this point, but are in doubt as to whether the defendant was afterwards able to attend to business and neglected to make his defense; but relief was granted. In White v. Washington, 5 Gratt. 645, the case was on a gaming consideration, and in this class of cases relief is granted in equity, although a defendant make no defense at law, or if he loses at law by fraud or misfortune he need not pursue his rights at law, but has an immediate right in an application to equity. A bill for discovery may be had after judgment at law, if the subject is a gaming consideration. The courts do not require such dilligence from defendants in cases of gaming as in other cases. These cases, proceeding on a wide application of equitable doctrines, as a matter of public policy, can be of doubtful application of principle in cases of surprise. In all gaming cases, whether at law or equity, there is a tendency to a great latitude. And see 12 S. & M. 157, 9 Md. 526. In Kersey v. Rash, 3 Del. Chy. R. 321, relief was prayed on grounds of defendant's sickness, and other grounds, but refused. This is the best considered of all recent cases and collates a large number of authorities. In Frick Co. v. Caffrey, 48 Mo. App. 120, relief in equity was refused, although sickness alleged. Sickness in family is good ground for a new trial, where a party if he had been present could have obtained a continuance. A father is not obliged to leave a sick wife in order to attend court or move for a continuance. Peebles v. Ralls, 1 Litt. (Ky.) 25; Bank v. Reynolds, 76 Ga. 834. See, *contra*, Pharr v. Reynolds, 3 Ala. 521. Relief was refused, although no defense on account of sickness as an excuse. Cole v. Hundley, 8 S. & M. 473. In Mock v. Cundiff, 6 Porter (Ala.), 24, the defendant employed an attorney who failed to attend court on account of sickness, and defendant did not attend, and judgment was entered; equity refused to interfere.

[13] 3 L. C. Eq. (3d Am. Ed.) 195, *n*; Crim v. Handley, 94 U. S. 659.

[14] Freeman Judg., § 500, *a*.

[15] Spell. Ex. R. §§ 106, 111. See Adams Eq. (7th Am. Ed.) 197, *n*.

[16] Fowler v. Roe, 11 N. J. Eq. (3 Stock.) 367.

[17] Beveridge v. Hewitt, 8 Ill. App. 467.

[18] Pearce v. Chastain, 3 Ga. 229.

[19] Kersey v. Rash, 3 Del. Chy. 321, 344.

[20] Spell. Ex. R. § 83.

[21] Brashear v. West, 7 Pet. 608, 616.

[22] Pearce v. Chastain, 3 Ga. 229; *cf.* 3 L. C. Eq. (3d Am. Ed.) 192, *n*.

[23] Stinnett v. Bank, 9 Ala. 120; 3 L. C. Eq. (3d Am. ed.) 193, *n*; Bellamy v. Woodson, 4 Ga. 181; Meem v. Rucker, 10 Gratt. 506, *Id.* 504; Ross v. Holloway, 60 Miss. 553. In Cole v. Hundley, 8 S. & M. 478, sickness was alleged, but there was such negligence that relief was refused. The principal authority, and in which Marshall, C. J., delivers the opinion refusing relief, is, Marine Ins. Co. v. Hodgson, 7 Cr. 332. In Odell v. Mundy, 59 Ga. 641, the client was sick and the attorney neglected the case and judgment was entered, but no relief granted. In Wallace v. Richmond, 26 Gratt. 70, 71, party employed an attorney and left the case with him, and paid no further attention to it, although he was near court at the term. The attorney neglected the case and judgment went by default. The court, in its opinion, charges negligence on the attorney and also on the client. And in the case of Kern v. Strasburger, 71 Ill. 413, the court says, that combined diligence of attorney and party is required, imposing on the client

party is required to be alert and diligent in attending trial, in discovering his defense and bringing it forward.[24] The neglect or fault of attorney is that of client,[25] and it cannot be ground for relief, although the attorney be irresponsible, unless the same fault were excusable in client,[26] and he who fails to make his defense cannot, on complaint against his attorney, have relief.[27] An attorney is usually expected to bestow a considerable degree of care, attention and diligence on a client's business. And failure of care is less pardonable than failure to exercise proper skill, and is less leniently treated by the courts.[28]

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a correlative duty as on attorney, and relief was refused although the attorney advised the party not to pay more attention to the suit, that he would attend to the case. And see Rogers v. Parker, 1 Hugh. 148, where, although an appearance entered and complainant and counsel were absent, judgment was given, and equity refused to relieve. In Mock v. Cundiff, 6 Porter (Ala.), 24, complainant did not attend court and attorney sick and absent. Equity refused to relieve from the judgment, and the chancellor says: "It is a circumstance of great weight in considering this question that plaintiff did not attend court himself. He shows no ground for his failure to do so, and appears to have been negligent of his interests." And in Crim v. Handley, 94 U. S. 659, the court says: "It does not appear if the party, if he had been present might not have employed an attorney. And for his absence and inattention, no relief was granted. See Rich. Enq. Co. v. Robinson, 24 Gratt. 548.

[24] Spell. Ex. R. § 95.

[25] Freem. Judg., §§ 500, 112; Burton v. Wiley, 26 Vt. 430, 434; Weeks, Attys., § 294.

[26] Kern v. Strasburger, 71 Ill. 416; Wynn v. Wilson, Hempst. 699; Beach Mod. Eq. Jurisp. § 661; Rogers v. Parker, 1 Hugh. 154; High, Inj. (3d ed.) 157.

[27] Albro v. Dayton, 28 Ill. 325.

[28] Weeks, Attys., 580.

CONDITIONAL SALE — SUBSEQUENT PURCHASER WITH NOTICE.

JONES V. CLARK.

Supreme Court of Colorado, Nov. 20, 1894.

One who becomes a creditor of a vendee holding property under a conditional bill of sale, with notice thereof, acquires a lien subject to that of the vendor.

GODDARD, J.: The facts upon which the question presented for our consideration upon this review arose are in brief as follows: Clark and Denman, the defendants in error, brought an action against Samuel Fickes and Samuel Bennett to recover for goods, wares, and merchandise sold and delivered, sued out a writ of attachment, and levied upon one "engine, Reliable No. 78; one Bay State boiler, thirty-five horse power; one No. 2 Dixie sawmill and attachments, including saws and all sawmill attachments; one inspirator, as the property of Samuel Bennett, and being at the time of levy in his possession." In that action A. E. Jones, plaintiff in error, intervened, claiming to be the owner of the property. Upon the trial of this intervention, the uncontradicted evidence discloses that prior to the 15th day of October, 1890, Jones was the owner of the property, and on that date sold the same to Fickes and Bennett under the following agreement: "This agreement, made the 15th day of October, A. D. 1890, between A. E. Jones, of Aspen, Colorado, and S. Fickes and S. Bennett, of the same place, witnesseth: That whereas, the said Fickes & Bennett have a sawmill and appurtenances, consisting of one engine, Reliable No. 78; one Bay State boiler, thirty-five horse power; one No. 2 Dixie sawmill and attachments, including saws and all sawmill attachments; one inspirator, the property of A. E. Jones, in their possession: Now, for and in consideration of the sum of $1, to him in hand paid, the said Jones agrees to sell and deliver the same to said Fickes & Bennett for the sum of $1,513.50, to be by them paid therefor, and which sum they agree to pay therefor to said Jones in installments; and the said Fickes & Bennett hereby agree that no title to any part of said property shall vest in them by reason of any payments made on account thereof until the entire purchase price shall be fully paid, and that, in case of their failure fully to pay said purchase price, any part payments made on account thereof shall become and be forfeited to the said E. A. Jones, as rent for the use of said property by the said Fickes & Bennett, and that, until paid for, they hold and will hold the same as the agents of the said A. E. Jones. The purchase price the said Fickes & Bennett promise and agree to pay in full on or before the 15th day of April, 1891. Upon the payment of said purchase price in full, the said Jones shall and hereby agrees to deliver to said Fickes & Bennett, or their assigns, a bill of sale of said property, and every part thereof. In witness whereof," etc. There was evidence introduced tending to show that, prior to giving the credit for the merchandise sued for in the original action, Clark and Denman were notified by Jones of the terms upon which Fickes and Bennett had purchased the engine, boiler, etc., and that he (Jones) claimed the mill as his own until it was paid for according to the terms of the agreement. The court disregarded this testimony, and held that, "as a matter of law, it is immaterial whether the plaintiffs, before giving credit to Fickes & Bennett, had notice of the contract and conditions under which the intervener delivered the property in question; * * * that, notice to said plaintiffs being immaterial, the plaintiffs are entitled to hold said property as against the intervener,"—and rendered judgment in favor of plaintiffs, and dismissed the petition of intervention, at the costs of intervener. To

reverse this judgment, intervener prosecutes this writ of error.

It being conceded that Fickes and Bennett held possession of the property in question by virtue of the agreement of sale above set forth, and had not paid the agreed consideration therefor, the sole question presented by the record is whether a conditional sale of this character can be upheld as against a creditor of the vendee, who becomes such with full knowledge of its terms. There would be no difficulty in answering this question were it not for the former decisions of this court. In the case of George v. Tufts, 5 Colo. 162, conditional sales of this kind are held to be "constructively fraudulent as to creditors, and the property, so far as their rights are concerned, is considered as belonging to the purchaser holding the possession," and that notice of the lien does not affect the right of creditors; while in the later case of Gerow v. Castello, 11 Colo. 560, 19 Pac. Rep. 505, it was expressly held that a conditional sale was good as against a purchaser with notice. The rules announced in these cases are so at variance as to leave the law of this State upon the subject of conditional sales in doubt and uncertainty; and it devolves upon us in this case, since the question of the validity of a conditional sale as against one who purchases the property, or a creditor who gives credit to the vendee with notice of its terms, is directly presented, to settle this doubt, and determine what rule shall obtain in this jurisdiction. The latter case is in accord with the current of authority in England and in this country, and in effect overrules the former decision in George v. Tufts, *supra*. But the court, in pronouncing the opinion, omits any mention of that case; and since the doctrine announced therein is predicated upon several Illinois decisions, and follows the exceptional doctrine of the courts of that State, upon the theory that it is based upon and grew out of peculiar statutory provisions in relation to chattel mortgages similar to our own, which changed the common law, and inhibited sales of this character, it becomes important to examine the cases so relied on, and determine if the assumption of the court in this respect was well founded. They are Murch v. Wright, 46 Ill. 488; McCormick v. Hadden, 37 Ill. 370; Ketchum v. Watson, 24 Ill. 591; Hervey v. Locomotive Works, 93 U. S. 664.

The case of Murch v. Wright, *supra*, involved the construction of an instrument in the form of a lease for a piano. The court held that the transaction, although in the form of a lease, was a conditional sale of the piano; also, that it was "a contract legal and valid as between the parties, but made with the risk on the part of the vendor of losing his lien in case the property should be levied upon by creditors of the purchaser while in the possession of the latter,"—citing, in support of the proposition thus announced, Jennings v. Gage, 13 Ill. 610; Brundage v. Camp, 21 Ill. 330; McCormick v. Hadden, 37 Ill. 370. No mention is made of the chattel mortgage act, nor do either of the cases cited involve consideration of a chattel mortgage, nor in fact a conditional sale.

The question at issue in Jennings v. Gage was whether certain goods were delivered with the consent of the vendor. The facts were: Gage, Dater & Massey, merchants of the city of New York, sold to Van Valin a bill of goods, taking in payment his notes at four, six, and nine months, secured by amortgage on real estate in Wisconsin, the goods to be shipped to Chicago, but not to be delivered to Van Valin until he gave an indorser on the notes satisfactory to J. H. Murch. The goods were forwarded to Van Valin care of James Peck & Co., warehousemen, who were instructed by Murch not to deliver them without instructions from him. Van Valin, however, paid the charges, and obtained possession of the goods, without giving the indorser, and subsequently sold them to Jennings. Gage *et al.* brought an action of trover against Jennings for their value, and recovered judgment. The judgment was reversed for error in the instructions given to the jury. The court say: "The questions of law arising upon the other instruction, and the qualification annexed, are of a different character. That instruction is based on the supposition that Jennings was a purchaser of the goods in good faith and for a valuable consideration. Whether the evidence would have justified the jury in finding that he was such a purchaser is not now the question. The good faith of the transaction was a matter peculiarly appropriate for the consideration of the jury, and as such the defendant had the right to have it submitted to and passed upon by them. * * * Does the instruction, as qualified by the court, exclude the idea of Van Valin having obtained possession of the goods by the consent of plaintiffs? If it does, the instruction was correct; otherwise it was erroneous. A moment's consideration will show that all the facts stated hypothetically in the qualification may be true, and still Van Valin may have got the possession of the goods temporarily, by the consent of the plaintiffs. * * * Under such circumstances, a *bona fide* purchaser from Van Valin would be protected."

In Brundage v. Camp, *supra*, the facts were Brundage sold two mules to one Crouch, and delivered them upon the promise of Crouch that he would give a note with security on a certain day. Relying on this promise, Brundage delivered the mules, saying that if the note and security was given on Monday, the mules should be his. Crouch failed to give the note and security, and afterwards sold the mules to Camp, who had no notice of the arrangement between Brundage and Crouch. Brundage brought an action of replevin against Camp to recover possession of the mules. Breese, J., speaking for the court, says: "Here, then, was an unconditional delivery. It did not depend, and could not depend, on the giving a note and security at a future day, for the delivery was *in præsenti* and absolute, qualified by nothing,—by no condition." And, after discus-

sing the authorities upon the general question of conditional sales, he further says: "Now, in this case, the plaintiff, with the intention of selling, voluntarily parted with the mules on the deceitful promise of Crouch to furnish the note and security. The plaintiff put Crouch in full possession of the property, clothed him with the strongest marks of ownership of such property, enabling him to thereby commit the fraud, which he did commit by the sale to the defendant, who is a *bona fide* purchaser for a fair price. * * * There is no pretense in this case that Camp, before his purchase, had any notice whatever of this secret claim of Brundage on the property. He is to all intents and purposes a purchaser in good faith for a valuable consideration, and without notice of any liens on the property."

In McCormick v. Hadden, also cited in George v. Tufts, it appears Gilbert Hadden had purchased a span of horses from George M. Hadden, and they were delivered to him, under an agreement that he was to give a chattel mortgage as security for the purchase money. This he failed to do. About a year afterwards, Gilbert Hadden gave a chattel mortgage on the horses to McCormick as security for the purchase price of a reaper. After the paper was delivered and the mortgage given to McCormick, George M. Hadden took the horses away. Thereupon McCormick brought an action of replevin, and recovered their possession. If support is found in these decisions for the rule announced in Murch v. Wright, it is only to the extent that, under a conditional sale, the vendor's title cannot be asserted against an innocent purchaser.

The case of Ketchum v. Watson was decided upon the following facts: Watson sold a horse to Outlaw for $80, took his note for the amount, and delivered the property. Outlaw not being able to pay the note, it was afterwards agreed that the sale should be rescinded; that Watson should destroy the note, and Outlaw should keep the horse, and, if he paid Watson by the 1st of February, following, then he was to own the horse. If he did not pay at that time, it was to be Watson's property. The court say: "The sale to Outlaw of the horse in question, made in August, 1859, was perfected by delivery to him, His title was then complete.' The resale by Outlaw to Watson, in October following, was not perfected by the delivery, nor was there any change of possession. The title, therefore, did not pass. To pass the title as between third persons, there must be a change of possession, so that others may not be deceived and defrauded by the appearance of ownership in one, while the title is really in another." The court adds the remark: "The whole transaction is in fraud of the chattel mortgage act." We are unable to see what relation this remark could have to the facts in the case, the question decided being that a sale of personal property without delivery did not pass the title, and would not be valid as against creditors, not by reason of any contravention of the chattel mortgage act, but because it was against the policy as established in that State, and would have been invalid here by virtue of our statute of frauds, and is like in principle to the case of Cook v. Mann, 6 Colo. 21.

The case following this in the same volume, being an action between Ketchum and another Watson (24 Ill. 592), is a case more in point upon the question involved in the case of George v. Tufts, and upon the question before us. The plaintiff asked this instruction, which the court gave: "If the plaintiff sold Outlaw a horse, conditioned that it should not be his property until paid for, and that Ketchum was cognizant of such contract, they will find for plaintiff, unless the property was in possession of Outlaw, and the indebtedness secured to Ketchum before such notice, and while Outlaw had said horse in his possession; and, if such be the case, you will find for defendant. We think the court erred in giving it without this material qualification, namely, that Ketchum was cognizant of the contract before he gave credit to Outlaw. This view rendered it necessary that the court should have given the third instruction asked by defendant,—that, unless they believe from the evidence that Ketchum had notice of the sale to Outlaw before he purchased the notes, they will find for defendant. It was error to refuse this instruction."

The only other case cited is Hervey v. Locomotive Works, 93 U. S. 671, an action which originated in the State of Illinois, and involved the validity of a conditional sale of locomotives, and was determined by the law as it was previously decided by the courts of that State. The court say: "The policy of the law in Illinois will not permit the owner of personal property to sell it, either absolutely or conditionally, and still continue in the possession of it. * * * The courts of Illinois say that to suffer, without notice to the world, the real ownership to be in one person, and the ostensible ownership in another, gives a false credit to the latter, and in this way works an injury to third persons." The court speaks of the policy of the law as declared by the courts of Illinois, and does not deny the right of a vendor to make a conditional sale of personal property because of any statutory limitation but because of the adoption by those courts of the principle that it was against public policy to permit a transfer and delivery of the possession of personal property clothed with a secret lien, and thereby enable the ostensible owner to induce false credit on the strength of his possession. Neither in this case, nor in any of the Illinois cases that we have been able to find, is any support found for the proposition announced in George v. Tufts,—that notice of a lien did not affect the rights of creditors. It is true the Illinois courts did so hold in the cases cited to this proposition, to-wit, Frank v. Minor, 50 Ill. 447, and Porter v. Dement, 35 Ill. 478; but those were cases where a chattel mortgage had been given, and was defective in failing to comply with the

statutory requirements,—a proposition not in any way involved in George v. Tufts, nor in any manner analogous to it. In this respect the court not only misapprehended the effect of the Illinois decisions, but went far beyond them; and we are unable to find in those cases any construction of a chattel mortgage act that we feel bound to follow and accept by reason of the adoption of that statute by our legislature. Nor do we feel bound to follow the doctrine of those decisions any further than they may meet our approval as the correct enunciation of principles of general jurisprudence.

The question of a conditional sale was before the Supreme Court of the United States subsequently in Harkness v. Russell, 118 U. S. 663, 7 Sup. Ct. Rep. 51, a case that originated in the territory of Idaho, where there existed a law relating to chattel mortgages, and in the transaction in question they had made no effort to comply with that law. Judge Bradley, in an elaborate opinion, after referring to the authorities upon this subject, both English and American, sustained the sale, both upon reason and authority. Speaking of the Illinois cases, he said: "The law has been held differently in Illinois and very nearly in conformity with the English decisions under the operation of the bankrupt law. The doctrine of the Supreme Court of that State is that if a person agrees to sell to another a chattel on condition that the price shall be paid within a certain time, retaining the title in himself in the meantime and delivers the chattel to the vendee, so as to clothe him with the apparent ownership, a *bona fide* purchaser or an execution creditor of the latter is entitled to protection as against the claim of the original vendor. * * * We do not mean to say that the Illinois doctrine is not supported by some decisions in other States. There are such decisions, but they are few in number compared with those in which it is held that conditional sales are valid and lawful, as well against third persons as against the parties to the contract. * * * It is only necessary to add that there is nothing either in the statute or adjudged law of Idaho to prevent in this case the operation of the general rule, which we consider to be established by overwhelming authority, namely, that, in the absence of fraud, an agreement for a conditional sale is good and valid, as well against third persons as against the parties to the transaction, and the further rule that a bailee of personal property cannot convey the title, or subject it to execution for his own debts, until the condition on which the agreement to sell was made has been performed."

The rule announced in Gerow v. Castello, *supra*, is not only sustained by the great weight of authority, but is also founded, upon the better reason, and, in adhering thereto, we place ourselves in line with the general current of authority. It is certainly equitable, and can in no instance work a hardship to third parties, to uphold conditonal sales of personal property as valid against those who purchase the same with notice, and creditors who become such with knowledge of the vendor's rights, and where no false credit has been induced by the ostensible ownership and possession of the vendee. In this view of the law, it was a material inquiry before the trial court whether the defendants in error had notice of the conditions upon which Fickes and Bennett purchased the property in question, and the court erred in disregarding the testimony introduced upon that question. For this reason the judgment will be reversed, and the cause remanded. Reversed.

NOTE.—In Hussey v. Thornton, 4 Mass. 404, decided in 1808, where goods were delivered on board a vessel for the vendee upon an agreement for a sale, subject to the condition that the goods should remain the property of the vendors until they received security for payment, it was held that the property did not pass, and that the goods could not be attached by the creditors of the vendee. This case was followed in 1822 by that of Marston v. Baldwin, 17 Mass. 606, and by Barrett v. Pritchard, 2 Pick. 512. In Coggill v. Hartford & New Haven Railroad, 3 Gray, 545, the rights of a *bona fide* purchaser from one in possession under a conditional sale of goods were specifically discussed, and the court held in an able opinion by Mr. Justice Bigelow, that a sale and delivery of goods on condition that the title shall not vest in the vendee until payment of the price passes no title until the condition is performed, and the vendor if guilty of no laches may reclaim the property, even from one who has purchased from his vendee in good faith and without notice. This case was followed in Sargent v. Metcalf, 5 Gray, 306; Deshon v. Bigelow, 8 Gray, 159; Whitney v. Eaton, 15 Gray, 225; Hirschorn v. Canney, 98 Mass. 149, and Chase v. Ingalls, 122 Mass. 381, and is believed to express the settled law of Massachusetts. The same doctrine prevails in Connecticut. Forbes v. Marsh, 15 Conn. 384; Hart v. Carpenter, 24 Conn. 427. In New York the law is the same, at least, so far as relates to the vendee in a conditional sale, and to his creditors; though there has been some diversity of opinion in its application to *bona fide* purchasers from such vendee. Haggerty v. Palmer, 6 Johns. Ch. 437; Strong v. Taylor, 2 Hill, 326; Herring v. Hoppock, 15 N. Y. 409. In the cases of Smyth v. Lynes, 5 N. Y. 41, and Wait v. Green, 36 Barb. 585, 36 N. Y. 556, it was held that a *bona fide* purchaser without notice from a vendee who is in possession under a conditional sale will be protected as against the original vendor. These cases were reviewed and substantially overruled in Ballard v. Burgett, 40 N. Y. 314. Subsequent cases in that State are in harmony with that decision. Cole v. Mann, 62 N. Y. 1; Bean v. Edge, 84 N. Y. 510. The decisions in Maine, New Hampshire and Vermont, are substantially those of Massachusetts and New York, though by recent statute in Maine and Vermont, as also in Iowa, where the same ruling prevailed, it is declared in effect that no agreements that personal property bargained and delivered to another shall remain the property of the vendor, shall be valid against third persons without notice. George v. Stubbs, 26 Me. 243; Sawyer v. Fisher, 32 Me. 28; Brown v. Haines, 52 Me. 578; Boynton v. Libby, 62 Me. 253; Rogers v. Whitehouse, 71 Me. 222; Sargent v. Gile, 8 N. H. 325; McFarland v. Farmer, 42 N. H. 386; King v. Bates, 57 N. H. 446; Hefflin v. Bell, 30

Vt. 134; Armington v. Houston, 38 Vt. 448; Fates v. Roberts, 38 Vt. 503; Duncan v. Stone, 45 Vt. 118; Moseley v. Shattuck, 43 Iowa, 540; Thorpe v. Fowler, 57 Iowa, 541. The same view of the law has been taken in New Jersey. Cole v. Berry, 42 N. J. Law, 308.

In Pennsylvania it is understood to be somewhat different, a distinction being made between delivery under a bailment with an option to purchase and delivery under a contract of sale containing a reservation of title in the vendor. Chamberlain v. Smith, 44 Pa. St. 437; Marsh v. Mathist, 14 S. & R. 214; Rose v. Story, 1 Pa. St. 190; Haak v, Linderman, 64 Pa. St. 499. In Ohio the validity of conditional sales accompanied by delivery of possession is fully sustained. Sanders v. Keber, 28 Ohio St. 630; Call v. Seyman, 40 Ohio St. 670. The same law prevails in Indiana (Shireman v. Jackson, 14 Ind. 459; Dunbar v. Rawles, 28 Ind. 225; Bradshaw v. Warner, 54 Ind. 58; Hodson v. Warner, 60 Ind. 214; McGirr v. Sells, 60 Ind. 249). Michigan (Whitney v. McConnell, 29 Mich. 12 ; Smith v. Logo, 42 Mich. 6; Marquette Manuf. Co. v. Jeffrey, 49 Mich. 283). Missouri (Ridgeway v. Kennedy, 52 Mo. 24; Wangler v. Franklin, 70 Mo. 650; Sumner v. Cattey, 71 Mo. 121). Alabama, Fairbanks v. Eureka, Co. 67 Ala. 109; Sumner v. Woods, 67 Ala. 149; Arkansas, McIntosh v. Hill, 47 Ark. 363; Simpson v. Shackelford, 49 Ark. 63. Kansas, Sumner v. McFarlan, 15 Kan. 600; Hall v. Draper, 20 Kan. 137. The law has been held differently in Illinois, as shown by the principal case, and very nearly in conformity with the English decisions under the operation of the bankrupt law. For a very elaborate collection of cases on the subject see Mr. Bennett's note to Benjamin on Sales, 4 Ed. § 320, pp. 326-336, and Mr. Freeman's note to Kanaga v. Tayor, 7 Ohio St. 134, in 70 Amer. Dec. 62.

JETSAM AND FLOTSAM.

DEVELOPMENT OF THE LAW OF PRIVACY.

One or two bits of news in the law of privacy may be given. The well-known English case of Prince Albert v. Strange has been followed in W. S. Gilbert v. The Star Newspaper, 11 The Times Law Reports, 4, where Mr. Gilbert got an injunction against the disclosure of the "gags" and the plot of "His Excellency" before the public performance of that comedy. An article, "The Right to Privacy," by Mr. Herbert Spencer Hadley, appeared in the October number of the Northwestern Law Review (vol. iii, p. 1). Mr. Hadley is not inclined to admit the existence of a right to privacy. "When an individual walks along the streets in the sight of all," according to Mr. Hadley, "he has waived his right to the privacy of his personalty:" and if a newspaper reporter sketches him and publishes the sketch accompanied by a "description of the peculiarities of his appearance, walk, habits, and manners,"—why, Mr. Hadley is sorry for the individual if it is distasteful. Mr. Hadley also makes the point that the right to privacy stretches equity jurisdiction beyond its proper limits. But it is not clearly set forth how it does so to a greater degree than any case of first impression does. And, finally, Monson v. Tussand (10 The Times Law Reports, 199, 227, noticed 7 Harvard Law Review, 492), the most important recent English case on the subject, is not mentioned, though decided and commented upon more than six months before the publication of this article.

Corliss v. Walker, 57 Fed. Rep. 434, came up a second time on Nov. 19, 1894, on a motion to dissolve the injunction restraining the use by the defendants of a picture of the late Mr. Corliss. Colt, J., decided that the injunction must be dissolved, Mr. Corliss being a public character, and his personal appearance therefore in a sense public property. On the rights of a private person the language is explicit. Colt, J., says that, "Independently of the question of contract, I believe the law to be that a private individual has a right to be protected in the representation of his portrait in any form, that this is a property as well as a personal right, and that it belongs to the same class of rights which forbids the reproduction of a private manuscript or painting, or the publication of private letters, or oral lectures delivered by a teacher to his class, or the revelation of the contents of a merchant's books by a clerk."

The other branch of the case still stands for the proposition that one may write and publish about either public or private persons; but, Mr. Corliss being held to be a public man, the remarks about private persons may be fairly said to be *obiter*, and the point open for the consideration which some gross case of invasion of privacy may soon require for it.

Mr. Hadley's article is well worth reading as the first attempt to make a careful presentation of the reasons against the right to privacy. And the new cases are interesting as showing that the law on the subject is in no danger of becoming obsolete, but rather serves a real and useful purpose to an increasing number of complainants.—*Harvard Law Review.*

CORRESPONDENCE.

To the Editor of the Central Law Journal:

A QUERY—LIABILITY OF CHATTEL MORTGAGE TO GARNISHMENT.

I would respectfully ask through the columns of your paper, or otherwise, an answer to the following: "Is a chattel mortgagee who takes possession of mortgaged property and thereafter disposes of it in a manner not according to law for a great deal less than its value and for just enough to satisfy his own claim, liable in garnishment to a creditor of the mortgagor for the surplus of its value after satisfying his own claim, the process in garnishment being issued after the mortgagee has disposed of the property?" Also, "Is he liable in garnishment if he converts the property to his own use."

Leavenworth, Kansas. WILLIAM W. HOOPER.

BOOK REVIEWS.

FITNAM'S TRIAL PROCEDURE.

This is a treatise on procedure in civil actions and proceedings in trial courts of record under the civil codes of all the States and territories. The object of the work, as disclosed by its author, "is to point out to young and inexperienced practitioners what to do in procedure from the initiatory step in an action or proceeding, step by step, through its various stages; how to do it correctly, and what not to do because improper." The first twenty-one chapters treats of the courts, their jurisdiction, organization, powers and officers. The twenty-second and subsequent chapters treat of the summons and subsequent procedure to the end of the action including a chapter on Bills of Exceptions and procuring amended Bills of Exceptions. We have found the work to be well written.

and apparently prepared in a painstaking and accurate manner. It seems to embrace all the questions liable to arise in connection with procedure, and though the citation of cases is not very voluminous, it is probably sufficient. It is a book of over eight hundred pages with a good index. Published by West Publishing Co., St. Paul.

AMERICAN STATE REPORTS, VOL. 39.

In this volume will be found reported, Sanders v. McMillian (Ala.), on the subject of assignment of dower; Van Matre v. Sankey (Ill.), on adoption by one person of the children of another; Ferguson v. Harris (S. Car.), on moral obligation to uphold an express promise, to each of which is appended a voluminous and valuable note.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ADMINISTRATION—Appointment of Administrator.—Where letters of administration are granted to intestate's sister, and a person alleging herself to be his widow petitions the orphans' court to revoke the sister's letters of administration, upon denial by the sister that the petitioner is intestate's widow, a prayer by the widow that the issue "whether the petitioner, I R, is the widow of W R, deceased," should have been granted.—RICHARDSON V. SMITH, Md., 30 Atl. Rep. 568.

2. ADMINISTRATION—Lien—Cosureties—Contribution.—Under Rev. St. 1894, §§ 2465 2469, relating to the filing and enforcement of claims against an estate, construed in connection with Rev. St. 1894, §§ 2484, 2491, 2505, relating to liens upon the realty of a decedent, the lien created in favor of cosureties with deceased, by their payment of a judgment rendered against themselves and deceased, as defendants, where the sums paid by them severally are entered as credits upon the docket of said judgment, continues against the realty of deceased until discharged by decree or payment, though such lien is not filed as a claim against the estate.—BEACH V. BELL, Ind., 38 N. E. Rep. 819.

3. ADVERSE POSSESSION—Evidence.—Where a person enters upon a tract of timber land, claiming to own it, cuts wood therefrom for fuel and for fence posts and rails, such acts constitute possession, although the land is not fenced, and there is no house on it.—HORNER V. REUTER, Ill., 38 N. E. Rep. 747.

4. ADVERSE POSSESSION — Notice to Cotenant.—The possession of one tenant, asserting an exclusive right to the land under a deed conveying the land to him by specific description, is adverse to his cotenants having notice of the deed.—PUCKETT V. MCDANIEL, Tex., 28 S. W. Rep. 360.

5. ADVERSE POSSESSION—What Constitutes.—Where the owner of a lot builds over the line on the adjoining lot, by mistake as to the boundary, open, continuous, exclusive possession for the statutory period by the owner of such building and his grantee, with intention to hold adversely, constitute adverse possession.—WILSON V. HUNTER, Ark., 28 S. W. Rep. 419.

6. APPEAL—Evidence Dehors Record.—Evidence dehors the record, to establish certain facts affecting proceedings on appeal, is admissible in an appellate court; and the admission of such evidence, when uncontroverted, is not an assumption of original jurisdiction.—EHRMAN V. ASTORIA & P. RY. CO., Oreg., 38 Pac. Rep. 306.

7. APPEAL—Parties.—Where only a part of several defendants, against all of whom a joint judgment has been rendered, file a petition in error for the purpose of procuring the vacation of such judgment, and the judgment defendants, who have not joined in the petition in error, are not made defendants in error, there exists such defect of parties that the judgment complained of cannot be reviewed.—ANDRES V. KRIDLER, Neb., 63 N. W. Rep. 1014.

8. APPEAL—Parties.—Where, in an action against a town for injuries resulting from a defective highway, an individual is made codefendant, and judgment is rendered against the town and in favor of the codefendant, which is reversed on appeal, and new trial ordered, the codefendant will still be a party in the new trial, though the jury had found that he was not liable for the injury, and the appeal did not relate to his liability.—DUTHIE V. TOWN OF WASHBURN, Wis., 63 Fed. Rep. 1053.

9. ASSIGNMENT FOR BENEFIT OF CREDITORS—Bond—Attachment.—Under Code, art. 16, § 205, requiring a trustee for the benefit of creditors to file a bond, and providing that "no title shall pass" to such trustee "until such bond shall be filed," the property is subject to attachment by creditors of the assignor until such bond is filed.—WHITE V. PITTSBURG NAT. BANK OF COMMERCE, Md., 30 Atl. Rep. 567.

10. ASSIGNMENT FOR BENEFIT OF CREDITORS—Preferences.—Where by the withdrawal of one partner a new firm is created, which agrees to pay such member for his interest, and assumes the old debts, the new firm may, by a subsequent deed of trust for the benefit of creditors, give preference to the claim of such member and to the creditors of the old firm.—P. J. WILLIS & BRO. V. MURPHY, Tex., 28 S. W. Rep. 362.

11. ASSIGNMENT FOR BENEFIT OF CREDITORS—Rights of Trustee.—Where creditors execute to the trustee for the benefit of creditors a note to be applied in payment of a judgment secured by another creditor against the trustee, the trustee, if compelled to sue on the note, is entitled to take from the surplus a reasonable attorney's fee.—FETTERS V. ATKINSON, Mich., 63 N. W. Rep. 1047.

12. ASSIGNMENT IN INSOLVENCY — Validity.—An instrument of assignment in proper form, under the insolvency laws of this State, was subscribed by the debtor, duly acknowledged, the certificate of acknowledgment indorsed thereon, the assignee named therein, in whose possession it was left by the assignor, with instructions to the assignee to file it in the clerk's office, if certain creditors should commence suits against the debtor, and thereby undertake to obtain preferences, which suits were so commenced, and thereupon said assignee filed said assignment in the clerk's office, about two months after the date and signing of such assignment: Held, that said assignment was not invalid by reason of the manner of its

execution, nor the delay in filing the same.—HOLTOQUIST V. CLARK, Minn., 63 N. W. Rep. 1077.

13. ATTORNEY—Authority—Indemnity Bond.—An attorney at law, by virtue merely of his employment as such to prosecute an action, has no authority to execute, on behalf of his client, a bond to indemnify the sheriff from the consequences of levying upon property claimed by a stranger, the client residing and being at the place where the events took place, and there being full opportunity for prompt communication between client and attorney.—LUCE V. FOSTER, Neb., 63 N. W Rep. 1027.

14. BANK CHECKS—Estoppel to Deny.—In an action by a bank which has paid to another bank a check drawn on the former bank and transferred to the latter by a forged indorsement, it is immaterial whether the signature of the drawer of the check is genuine, since both parties are estopped to deny its genuineness.—FIRST NAT. BANK V. NORTHWESTERN NAT. BANK, Ill., 38 N. E. Rep. 739.

15. BANKS—Checks—Reasonable Time for Presentation.—Checks drawn on a Milwaukee bank were indorsed over to plaintiff and delivered to his father, who at once mailed them to plaintiff, at New Richmond, several hundred miles northeast of Milwaukee. Plaintiff delivered them to his bank, who mailed them to its Chicago correspondent,—having no Milwaukee correspondent, and they were then sent to Milwaukee: Held, that plaintiff did not use due diligence in presenting said checks for payment.—GIFFORD V. HARDELL, Wis., 63 Fed. Rep. 1064.

16. BUILDING ASSOCIATION — Payments on Stock.—The plan of a building association was that its members should make certain payments periodically upon the stock, and for other purposes; that the stock should mature at a fixed time. Its loans also matured at a fixed time. A member made a number of payments upon the stock, and also certain payments of interest and premium. She then ceased to pay. The association declared her stock forfeited, and instituted an action to foreclose the mortgage securing the loan: Held, that the payments upon the stock should, in an accounting of the amount due on the mortgage, be treated as payments *pro tanto* on the loan.—RANDALL V. NATIONAL BLDG. LOAN & PROTECTIVE UNION OF MINNEAPOLIS, Neb., 63 N. W. Rep. 1019.

17. CARRIER — Live-Stock—Feeding and Watering.—The statute making it the duty of a common carrier of live stock to feed and water the same in transit, and providing a penalty for the violation thereof, which may be recovered by the owner of the stock, does not apply to a shipment from a point in Texas to a point in another State —GULF, C. & S. F. RY. CO. V. GANN, Tex., 28 S. W. Rep. 349.

18. CARRIER OF GOODS—Termination of Liability.—In the case of portable boxes or packages of valuable merchandise, the liability of a railway company as common carrier does not terminate until the goods are removed from the cars and placed in its freight room, ready for delivery to the consignee, and the consignee has had a reasonable time thereafter to remove them. —KIRK V. CHICAGO, ST. P., M. & O. RY. CO., Minn., 63 N. W. Rep. 1084.

19. CARRIERS—Connecting Lines—Authority of Local Agent.—Where a local station agent has been for six months issuing bills of lading to points beyond his company's line, a contract made by him for transportation over a connecting line is binding on the agent's company, though it nas instructed him not to make such contracts, in the absence of actual or constructive knowledge of such instructions by the shipper.—GULF, C. & S. F. RY. CO. V. COLE, Tex., 28 S. W. Rep. 391.

20. CHATTEL MORTGAGE—Failure to Record.—A mortgage upon chattels, which, though given for a full consideration, is designedly kept from the record for a considerable period of time after its execution, while the chattels mortgaged remain in the possession of the mortgagor, is absolutely void as against creditors of the mortgagor whose debts accrue between the making and the recording of the mortgage, though such creditors obtain their lien upon the chattels after such recording, and though the mortgagee is innocent of any intention to defraud.—MEDING V. ROE, N. J., 30 Atl. Rep. 587.

21. CONSTITUTIONAL LAW—Bank—Receiving Deposit.—Laws 1885, p. 50, providing for the punishment of a person receiving deposits in a bank with knowledge of its insolvency, is not unconstitutional as being class legislation.—ROBERTSON V. PEOPLE, Colo., 38 Pac. Rep. 326.

22. CONSTITUTIONAL LAW—Statute—Bankers Receiving Deposits.—Act March 9, 1891, entitled "An act concerning bank officers, brokers, etc., receiving deposits after insolvency, repealing all laws in conflict therewith," and which purports, in its application, to include private bankers doing a partnership business, is not void as to such bankers on the ground that it embraces more than one subject.—STATE V. ARNOLD, Ind., 38 N. E. Rep. 820.

23. CONTRACTS — Action for Breach. — One who has contracted to sell bonds for notes and cash cannot sue for breach of the contract until he has offered to assign and deliver the bonds to the other party, unless such party has, by his own act, rendered a tender useless.—SHEPARD V. WEISS, Tex., 28 S. W. Rep. 355.

24. CONTRACT—Rescission—Undue Influence.—A complaint alleging that plaintiff was a feeble old man, of weak mind, and in financial straits, and that defendant with full knowledge of the facts, and with intent to cheat plaintiff, began an unfounded action against him for misrepresentations in an exchange of property, and by threats and undue influence induced him to execute, in compromise of such action, the note and mortgage which plaintiff seeks to cancel, states a cause of action.—TUCKER V. ROACH, Ind., 38 N. E. Rep. 822.

25. CONVERSION OF PROPERTY—Measure of Damages.—"The doctrine of accession of property applied where one has willfully, as a trespasser, taken the property of another, and altered it in substance or form by his own labor. Where, however, the appropriation was through a mistake of fact, and labor has been expended upon it which converts it into something very different from the original article and greatly increases its alue, and the value of the original article is insignificant in comparison with the new product, the title to the property in its converted form will pass to the person who has thus expended his labor, the original owner to recover the value of the original article."—CARPENTER V. LINGENFELTER, Neb., 63 N. W. Rep. 1022.

26. CORPORATION—Preference.—The relation of the directors and managing officers of an insolvent private corporation towards the property and assets thereof, is that of trustees for all of the creditors. Such officers cannot take advantage of their position to secure a preference for themselves, but are required to share ratably with other creditors.—INGWERSEN V. EDGECOMBE, Neb., 63 N. W. Rep 1033.

27. CORPORATION—Stock Subscription.—A stock subscription contract recited that the capital of the intended corporation should not exceed $50,000, and that the purpose of the corporation was to organize and establish a board of trade in Ft Worth; while the charter fixed the amount of the capital stock at $100,000, and declared the purpose of the corporation to be the erection of buildings, and the accumulation and loan of funds for the purchase of land in Ft. Worth and other cities: Held, that though defendant failed to repudiate said subscriptions on account of th discrepancy between the subscription contract and the charter, for several months fter the charter was obtained, he was not liable for the stock subscriptions in an action therefor by the corporation.—BAHER V. FT. WORTH BOARD OF TRADE, Tex., 28 S. W. Rep. 408.

28. CORPORATIONS — Subscriptions—Fraud of Promoters.—Acts and statements of the promoters of a corporation, tending to show that its real object was

illegal, which were never adopted or acted on by the corporation itself, do not invalidate stock subscription contracts made with the corporation.—UNITED STATES VINEGAR CO. v. SCHLEGEL, N. Y., 38 N. E. Rep. 729.

29. COUNTY ATTORNEY—Employment of Assistant.—Attorneys duly employed by the county attorney of one county to assist in the trial of a cause therein pending are not required or authorized, even on the request of such county attorney, to follow said cause on change of venue to another county; and if, notwithstanding this fact, they do so, they will not thereby entitle themselves to compensation for such unauthorized assistance as thereafter they may render.—SANDS v. FRONTIER COUNTY, Neb., 63 N. W. Rep. 1017.

30. COURT OF CLAIMS — Jurisdiction—Torts.—The court of claims has no jurisdiction of claims against the government for mere torts.—SCHILLINGER v. UNITED STATES, U. S. S. C., 15 S. C. Rep. 85.

31. CRIMINAL EVIDENCE—Assault—Act and Threats.—On a prosecution for an assault with intent to kill, defendant cannot, for the purpose of showing that he knew he was dealing with a dangerous man, after giving evidence of the general reputation of the man assaulted as a dangerous man, show that he pointed a gun at a third person on a former occasion.—JENKINS v. STATE, Md., 30 Atl. Rep. 566.

32. CRIMINAL EVIDENCE—Forgery.—In a prosecution for forgery, evidence of similar forgeries nine months after the one charged is not admissible.—PEOPLE v. BAIRD, Cal., 38 Pac. Rep. 310.

33. CRIMINAL LAW—Burglary—Possession of Stolen Goods.—An instruction held proper, which, in effect, left it to the jury to determine what weight and effect should be given the circumstance that the accused, soon after the burglary charged, was in possession of goods which had been taken from the store where the burglary had been committed.—WHITMANN v. STATE, Neb., 63 N. W. Rep. 1025.

34. CRIMINAL LAW — Embezzlement. — The terms "clerk" and "servant" of a private person or of any copartnership, used in section 1, ch. 104, Sess. Laws 1881 (section 88 Crimes Act; paragraph 2220, Gen. St. 1889), include the cashier of a partnership operating a private bank not incorporated, when such cashier is employed at a monthly salary to transact the business of the firm, under its direction and control.—STATE v. YEITER, Kan., 38 Atl. Rep. 320.

35. CRIMINAL LAW—Homicide.—An instruction that former threats against defendant not only cannot excuse defendant, if there was nothing indicating a deadly design against defendant at the time of the killing, but are evidence of special spite and special ill will on the part of the defendant, is erroneous.—THOMPSON v. UNITED STATES, U. S. S. C., 15 S. C. Rep. 73.

36. CRIMINAL LAW—Instructions.—Where the court, after having correctly stated the law applicable to such offense, charged as to irrelevant matter, if no injury is shown, the judgment will not be disturbed.—MCGUIRE v. STATE, Tex., 28 S. W. Rep. 345.

37. CRIMINAL LAW—Rape.—Whether or not the female is sufficiently developed to admit of it, penetration, however slight, is necessary to constitute carnal knowledge.—WHITE v. COMMONWEALTH, Ky., 28 S. W. Rep. 340.

38. CRIMINAL PRACTICE—Assault on Female Child.—An information for assaulting a female child under 12 years of age, and carnally knowing and abusing her, under Rev. St. § 4382, need not state that the assault was "unlawful."—BARNARD v. STATE, Wis., 63 Fed. Rep. 1058.

39. CRIMINAL PRACTICE—Larceny.—In an indictment for larceny under section 428 of the Penal Code, held, that the general allegations that the defendant withheld the money from the true owner, and appropriated it to his own use, are so limited and qualified by the allegations of the specific facts upon which the general allegations are predicated that the facts stated in the indictment do not constitute a public offense.—STATE v. FARRINGTON, Minn., 63 Fed. Rep. 1088.

40. DECEIT—Misrepresentations on Contract—Estoppel.—Where one was induced to contract to drive logs by a misrepresentation as to the number of logs—the logs being covered with snow—and he discovered their number while they were in the stream with other logs, from which it was impossible to separate them, he is not estopped to sue for the false representation because he drove the logs to their destination.—SILL v. MISSISSIPPI RIVER LOGGING CO., Wis., 63 N. W. Rep. 1065.

41. DEED—Construction—Estate Tail.—A deed to "J and his bodily heirs" creates a life estate in J, with remainder in fee to his children.—CLARKSON v. CLARKSON, Mo., 28 S. W. Rep. 446.

42. EJECTMENT BY DEVISEE—Defense by Legatee.—A legatee in possession of devised land, on which her legacy is a charge, cannot defend an action for the recovery of the land by the devisee by showing that the legacy has not been paid.—DINAN v. CONEYS, N. Y., 38 N. E. Rep. 715.

43. EJECTMENT—Defenses.—In ejectment by the purchaser of certain land at a sheriff's sale under a trust deed, it is no defense, where no offer to redeem is made, that such sale was not made at the request of the legal holder of the note secured by the deed, as required by the deed.—BIFFLE v. PULLAM, Mo., 28 S. W. Rep. 323.

44. ELECTION CONTEST—Sufficiency.—A notice of contest, in which it is stated that the contestant was an elector of the county, was a candidate for the office, that the candidate whose election he contests received a greater number of votes than himself, and that said successful candidate was ineligible, does not state facts sufficient to entitle such contestant to the said office.—BATTERTON v. FULLER, S. Dak., 63 N. W. Rep. 1071.

45. EMINENT DOMAIN.—Land owned by a street car company, and used by it as a horse barn and a salt warehouse, but on which it has no tracks, may be condemned by an elevated railroad company for its right of way.—CHICAGO W. D. RY. CO. v. METROPOLITAN W. S. EL. R. CO., Ill., 38 N. E. Rep. 736.

46. EMINENT DOMAIN—Damages.—The rule of damage as to vacate property not taken is whether, for any and all purposes for which the property may be used or sold, its market value would be less with the proposed improvement than without it; but where the land is used for a certain purpose, and is specially adapted thereto, the question is whether its market value for that purpose is lessened.—SNODGRASS v. CITY OF CHICAGO, Ill., 38 N. E. Rep. 790.

47. ESTOPPEL—Pleading.—An estoppel, to be available as a cause of action or defense, must be specially pleaded.—NEBRASKA MORTG. LOAN CO. v. BLUST, Neb., 63 N. W. Rep. 1016.

48. ESTOPPEL TO CLAIM FRAUD.—Plaintiff, a purchaser of notes, secured on land, brought an action to recover damages from the owner of the notes for misrepresentations as to the title and value of the land, and the amount owed thereon. Nine months after the purchase, plaintiff sold the land under the deed of trust, and, knowing that there was another incumbrance thereon, bid the land in for the amount of the notes: Held that, though plaintiff was induced to purchase the notes through misrepresentations of the vendor, he had, by bidding in the land for the value of the notes, accepted it in full satisfaction of the notes.—MARSALIS v. CRAWFORD, Tex., 28 S. W. Rep. 371.

49. EVIDENCE—Declarations.—Where plaintiff in replevin claims under a bill of sale from one A, and defendant claims under a mortgage from A after the alleged sale, and where there has been no change of possession, his claim to own the property is admissible.—EATON v. SIMS, Ark., 28 S. W. Rep. 429.

50. EVIDENCE—Parol Evidence—Note.—Evidence of a

parol agreement made at the execution and delivery of a note, by which it is not to be operative unless, within a given time, the makers are able to realize a given sum of money from property purchased, and for which the note was given, is not competent.—BEECHER V. DUNLAP, Ohio, 38 N. E. Rep. 795.

51. EVIDENCE—Public Document—Certified Copy.—A paper certified by the secretary of State, under his seal, to be a true copy of a description of routes of a trolley line, filed in his office, is not evidence.—STATE V. BOARD OF PUBLIC WORKS OF CITY OF CAMDEN, N. J., 30 Atl. Rep. 581.

52. EXECUTION—Levy.—Where an officer having in his possession an execution levies it upon personal property, and takes it into his custody, he may leave it with a receiptor or with a third party, subject to the officer's control, or may leave it with the debtor as agent of the officer; and in such case, if another person interferes with such property, or carries it away, the officer may maintain an action against him for so doing.—HORGAN V. LYONS, Minn., 63 N. W. Rep. 1099.

53. EXECUTION—Supplementary Proceedings.—Code Civ. Proc. § 2435, providing that at any time within 10 years after the return, wholly or partly unsatisfied, of an execution against property, the judgment debtor may be examined concerning his property, limits the supplementary proceeding to 10 years after the return of the first execution.—IMPORTERS' & TRADERS' NAT. BANK OF NEW YORK V. QUACKENBUSH, N. Y., 38 N. E. Rep. 728.

54. FEDERAL COURTS—Territorial Courts—Jurisdiction.—The "Districts Courts for the counties" organized under Rev. St. U. S. § 1874, authorizing judges of the Supreme Court of New Mexico to hold courts within their respective districts to hear all cases except those in which the United States is a party, and the "Judicial District Courts" organized under Rev. St. U. S. § 1910, providing that each of the District Courts in the Territory shall have the same jurisdiction in cases arising under the laws of the United States as is vested in the Federal Circuit and District Courts, have concurrent jurisdiction in actions by receivers of national banks.—SCHOFIELD V. STEPHENS, N. Mex., 38 Pac. Rep. 319.

55. FEDERAL COURTS—United States Circuit Court—Jurisdiction.—A trust company to which bonds are delivered merely to be held by it until the performance of a condition by the payee entitling it to possession, is a necessary, and not merely a formal, party to an action by such payee against it and the maker of the bonds to obtain their possession; and the United States Circuit Court of the State of which such maker is a resident has no jurisdiction of such action, where plaintiff and such trust company are both non-residents of such State, but residents of the same State.—MASSACHUSETTS & S. CONST. CO. V. TOWNSHIP OF CANE CREEK, U. S. S. C. 15 S. C. Rep. 91.

56. FRAUDS, STATUTE OF—Real Estate Agent.—Where an agent is employed to sell land, and he finds a purchaser, who is ready, willing, and able to purchase it upon the terms given the agent by his principal, the contract of sale need not be in writing as a condition precedent to the agent's right to recover for his services, especially if the principal is unable or refuses to perform upon his part. — VAUGHAN V. MCCARTHY, Minn., 63 N. W. Rep. 1073.

57. FRAUDULENT CONVEYANCES.—In an action to subject land to the assignor's debts, it appeared that after all the assignor's property subject to execution had been sold, and there were creditors unpaid, he started a saloon with his exempt property, and, when it became profitable, assigned it to his son, in whose name it was afterwards conducted. The son took no active part in the business, and, though there was evidence that his father had a salary for managing the business, there was no evidence that the son received any of the proceeds or any accounting. The land in suit was bought with the proceeds of the business, and the purchase was conducted in the son's name by the father, who caused title to be given to his wife: Held, that such transfer to the wife was fraudulent as against creditors.—ANSORGE V. BARTH, Wis., 63 N. W. Rep. 1055.

58. FRAUDULENT CONVEYANCES—Sale by a Firm to Partner.—Plaintiff bought, from a firm goods which were taken from his possession under attachment levied by firm creditors. There was some evidence that plaintiff was a member of the firm from which he purchased the goods: Held, that it was error to charge that if plaintiff, at the time of the purchase, was a partner in the firm from which he purchased, the sale was void as against creditors of the firm.—HUDGINS V. RIX, Ark., 28 S. W. Rep. 422.

59. FRAUDULENT CONVEYANCES—Subsequent Creditors.—Under Mansf. Dig. § 3374, providing that every conveyance with the intent to hinder or defraud creditors shall be void, a voluntary conveyance made with an actual intent to defraud creditors is void as to creditors both prior and subsequent.—MAY V. STATE NAT. BANK, Ark., 28 S. W. Rep. 431.

60. HIGHWAYS—Dedication — Prescription. —A railroad company built its station on lots bounded by two streets, and left vacant a strip of land parallel to each street, to be used as an approach to the station. This strip was paved by the company. The railroad officers testified that there was no intention to dedicate this land to the public: Held, that although such land had been so left open for more than 20 years, and had been used by the public as a part of the street, there was neither a common-law dedication nor a prescriptive title in the public.—CITY OF CHICAGO V. CHICAGO, R. I. & P. RY. CO., Ill., 38 N. E. Rep. 768.

61. HUSBAND AND WIFE — Community Property. — Where seven-tenths of the price of land was paid out of funds of the wife, and the rest was paid with borrowed money secured by a joint note of husband and wife, which was afterwards paid out of the wife's funds, the land is not the separate property of the wife, but she has an equitable seven-tenths interest therein.—GODDARD V. REAGAN, Tex., 28 S. W. Rep. 352.

62. HUSBAND AND WIFE—Separate Maintenance.—A wife voluntarily left her husband, and went to the place where she used to live, about two miles from his home. Afterwards, she expressed her willingness to return if he would come after her, and he declared himself willing to have her return if she would come back herself: Held, that his refusal to fetch her back did not render her living apart from him to be without fault on her part, so as to entitle her to separate maintenance.—THOMAS V. THOMAS, Ill., 38 N. E. Rep. 794.

63. INJUNCTION.—A preliminary injunction is properly refused when there exists no reasonable ground for apprehending that the injury against which the injunction is sought will be attempted. — NATIONAL DOCKS & N. J. JUNCTION CONNECTING RY. CO. V. PENNSYLVANIA R. CO., N. J., 30 Atl. Rep. 580.

64. INSURANCE — Application.—Where a policy contains a provision that "in consideration of warranties in application for this policy" the company "does hereby insure," the application, to the extent of the warranties referred to, is a part of the contract of insurance.—TRAVELERS' INS. CO. V. LAMPKIN, Colo., 38 Pac. Rep. 335.

65. INSURANCE COMPANY—Right to do Business.—In the absence of an express prohibitory statute, a corporation legally organized under the laws of another State to do a multiform insurance business may do such business in Illinois, although such a corporation could not be organized under the laws of Illinois.—PEOPLE V. FIDELITY & CASUALTY INS. CO. OF NEW YORK, Ill., 38 N. E. Rep. 752.

66. INSURANCE COMPANY—Service of Process.—Under Mansf. Dig. 1884, § 3834, providing for service of process on a foreign insurance company by service on the State auditor or on the party designated by such company to accept service, a service of summons on a general agent of such company, who is not so desig-

nated to accept service, is void.—ST. PAUL GERMAN INS. CO. v. CRADDOCK, Ark., 28 S. W. Rep. 424.

67. INTOXICATING LIQUORS — License.— The county, city, and village boards of this State have no anthority to issue liquor license on credit, and a license issued without payment in full of the fee prescribed therefor is void.—ZIELKE N. STATE, Neb., 63 N. W. Rep. 1010.

68. JUDGMENT—Collateral Attack.—On collateral attack by a minor on a judgment in partition, where the sheriff's return does not show that a copy of the writ was delivered to plaintiff or left at his usual place of abode, with a person of his family over 15 years old, the judgment is a nullity as to plaintiff.—FISHER v. SIEKUM, Mo., 28 S. W. Rep. 435.

69. JUDGMENT—Collateral Attack.—A judgment rendered in justice's court on default cannot be collaterally attacked on the ground that the complaint on which it was based did not state a cause of action.—NORTH PAC. CYCLE CO. v. THOMAS, Oreg., 38 Pac. Rep. 307.

70. JUDGMENT—Effect on Persons not Parties.—A judgment on a life insurance policy in favor of the beneficiary named therein, rendered in an action to which the widow of deceased was not a party, does not estop her from asserting a claim to said life insurance money before its payment to said named beneficiary.—WEIGELMAN v. BRONGER, Ky., 28 S. W. Rep. 335.

71. JUDGMENT FOR TAXES—Collateral Attack.—In an action, by a purchaser at a sale under a judgment for city taxes, for the possession of the property so purchased, evidence that the taxes were invalid because the city was not incorporated is inadmissible.—HIGGINS v. BORDAGES, Tex., 28 S. W. Rep. 350.

72. JUDGMENT—Interest.—Under Rev. St. 1889, § 5974 (Rev. St. 1879, § 2725), providing that all judgments for money on contracts bearing more than 6 per cent. shall bear the same interest borne by the contract, a judgment need not state the rate of interest, as the record can be consulted to ascertain the rate.—CATRON v. LAFAYETTE COUNTY, Mo., 28 S. W. Rep. 331.

73. JUDGMENT — Release—Priorities —A senior judgment creditor, who erroneously enters satisfaction of his judgment, is still entitled to priority, on such satisfaction being set aside, as against subsequent judgment creditors, whose judgments are recovered prior to the entry of satisfaction, and who have in no way been misled by such entry.—MCCUNE v. MCCUNE, Pa., 30 Atl. Rep. 577.

74. LEASE — Rescission.—Where an owner makes a lease of valuable mineral lands in consideration that the lessee will establish manufactories thereon, dig and quarry stone or other mineral therefrom, and the payment of one dollar per car load of mineral mined, and the lessee fails to erect manufactories or work the mineral, but, one year thereafter, agrees with several manufacturers not to work the mineral for three years, the lessor may rescind the contract.—OLIVER v. GOETZ, Mo., 28 S. W. Rep. 441.

75. LIFE INSURANCE—Contract—Premium Note.—Under a life policy providing that failure to pay, when due, "any moneys required to be paid," shall render the policy void, and a premium note executed at the same time reciting, that, if not paid at maturity, the policy shall become void, failure to pay works an absolute forfeiture.—LAUGHLIN v. FIDELITY MUT. LIFE ASS'N, Tex., 28 S. W. Rep. 411.

76. LIMITATIONS — Action against National Bank.—The limitation of two years within which an action under the provisions of section 5198, Rev. St. U. S., may be commenced for the recovery from a national bank of twice the amount of usury paid to it, dates from the actual payment of such interest, and not from the bank's reservation of it from the original loan by way of discount.—LANHAM v. FIRST NAT. BANK OF CRETE, Neb., 63 N. W. Rep. 1041.

77. LIMITATIONS—Land sold on Foreclosure.—A sale on mortgage foreclosure is a sale on execution, within Rev. St. 1894, § 294 (Rev. St. 1881, § 293), providing that an action by an execution debtor to recover land sold on execution must be brought "within ten years after the sale."—MOORE v. ROSS, Ind., 38 N. E. Rep. 817.

78. LIMITATION OF ACTIONS—Fraudulent Concealment of Cause of Action.—An agreement between a wife and a person guilty of adultery with her to deny the adultery, which is known to the husband, is not a fraudulent concealment of the husband's cause of action therefor, so as to prevent the running of limitations, though the husband has no means of establishing his case other than his own testimony.—SANBORN v. GALE, Mass., 38 N. E. Rep. 710.

79. LOST WILL — Suit to Establish.—In an action to establish a will, allegations of the execution of the will, the intestacy of the testatrix, and the destruction of the will after her death sufficiently show the existence of the will at the death of testatrix.—JONES v. CASLER, Ind., 38 N. E. Rep. 812.

80. MALICIOUS PROSECUTION — Evidence.—In an action for malicious prosecution in having plaintiff arrested on a charge of stealing property from a mill which he occupied as defendant's lessee, evidence that plaintiff bought the mill from defendant, and, after making him payments thereon for a number of years, had to surrender the mill to him, is not admissible.—GROUT v. COTTRELL, N. Y., 38 N. E. Rep. 717.

81. MASTER AND SERVANT—Fellow-servants.—Where a laborer on a work train is injured by the negligence of one who is both conductor of the train, and also foreman of the laborers, — having, in the latter capacity, power to hire and discharge the laborers at his discretion,—the question whether they are fellow-servants is for the jury.—MOBILE & O. R. CO. v. MASSEY, Ill., 38 N. E. Rep. 787.

82. MASTER AND SERVANT — Injuries—Assumption of Risk.—Where a brakeman notifies the railroad company that a lamp furnished him is defective, and liable to go out at any time, and the company promises to supply him with a new lantern in a short time, and directs him to go on with his work, he does not, by continuing work, assume the risk of danger from the defective lantern, unless the danger is so imminent that no one but a reckless person would continue in the service.—INDIANAPOLIS UNION RY. CO. v. OTT, Ind., 38 N. E. Rep. 842.

83. MASTER AND SERVANT — Injury — Defective Appliances.—The law does not require that an employer should furnish his servants the newest or the safest tools, machinery, or appliances for the performance of the work for which they are hired. If the master furnishes such machinery appliances, or tools to the servant as are reasonably safe and fit for the performance of the work in hand, and which the servant in the execution of his work, by the exercise of ordinary care on his part, may use with reasonable safety to himself, the master has discharged his duty in that respect.—MISSOURI PAC. RY. CO. v. BAXTER, Neb., 63 N. W. Rep. 1045.

84. MASTER AND SERVANT — Negligence of Master.—While plaintiff, a servant, was being carried to his work on a flat car, he was thrown to the ground by the car being suddenly stopped. The car couplings were worn, and the train was stopped by applying the air brakes to the engine without warning: Held, that plaintiff could not recover, as the evidence did not show the car couplings to have been dangerously defective, or that the engineer acted negligently.—COOPER v. WABASH R. CO., Ind., 38 N. E. Rep. 823.

85. MORTGAGE LIEN—Extinguishment.—K mortgaged land to A, and later gave a second mortgage to B. The first mortgage was foreclosed, B having been made a party, and after sale a sheriff's certificate was issued to A. Afterwards, K sold the land to P, who assumed payment of both mortgages. After the time of redemption had expired, P paid into court part of the amount of the foreclosure judgment, and gave A a mortgage for the balance, which was accepted in full satisfaction of such judgment. A then signed the sheriff's certificate to P: Held, that the first mortgage

to A was not paid and canceled, but that the priority of its lien was kept alive in the subsequent mortgage to A, as against holders of the second mortgage.—THOMPSON v. CONNECTICUT MUT. LIFE INS. CO., Ind., 38 N. E. Rep. 796.

86. MORTGAGE ON HOMESTEAD — Validity.—Where a mechanic's lien on a homestead has been legally created, any subsequent conveyance or lien, given with the design of meeting the demands of the mechanic's lien, is legal.—WATKINS v. SPROULL, Tex., 28 S. W. Rep. 356.

87. MORTGAGE—Priority.—A trust mortgage to secure bonds thereafter to be issued will stand as a security therefor from the date of its record, and will take precedence over subsequently accruing lien claims.—CENTRAL TRUST CO. OF NEW YORK v. BARTLETT, N. J., 30 Atl. Rep. 583.

88. MORTGAGE—Pending Foreclosure Suit.—One who purchases mortgaged land after a bill to foreclose has been filed, and summons served on the mortgagor, is bound by a decree of foreclosure afterwards rendered, though the mortgagee knew of the purchase, and did not make the purchaser a party, and though, also, the decree of foreclosure was erroneous.—NORRIS v. ILE, Ill., 38 N. E. Rep. 762.

89. MORTGAGES— Subrogation. — Where L holds a mortgage security for a debt, and S seeks to be subrogated to the rights of L in the security, he must pay the secured debt before he is entitled to the security. And when this is done the court, in the exercise of its equitable powers, can, if necessary, compel a transfer to him of the mortgage security.—LUMBERMEN'S INS. CO. v. SPRAGUE, Minn., 63 N. W. Rep. 1100.

90. MUNICIPAL CORPORATION—Assessment for Street Work—Appeal to City Council— Vacation of Assessment—Effect.—In an action to foreclose a special assessment lien, an order of the city council setting aside the assessment cannot be reviewed on the ground that such relief was not based on the objection made to the assessment.— BELSER v. HOFFSCHNEIDER, Cal., 38 Pac. Rep. 312.

91. MUNICIPAL CORPORATION—Improvements.— It is no objection to a special assessment by a city to pay for water mains that theretofore the city has paid for such mains out of the water tax fund.—MCCHESNEY v. CITY OF CHICAGO, Ill., 38 N. E. Rep. 767.
750.

92. MUNICIPAL CORPORATION—Local Improvements. —A clause, in an ordinance ordering a local improvement, to the effect that upon the filing of the report of the commissioners, and its approval by the city council, the corporation council shall file the proper petition in the county court, is a sufficient order for filing a petition for confirmation, since such order may be made as well before as after the commissioners have reported.—HALEY v. CITY OF ALTON, Ill., 38 Pac. Rep. 750.

93. MUNICIPAL CORPORATIONS—Special Assessments. —Act April 29, 1887, permits the division of special assessments into annual installments bearing interest till paid; directs that out of the first installment shall be paid all costs, and the balance paid to the contractor, to whom shall then be issued interest-bearing vouchers for the rest of the contract price; and provides that if, upon issuance of such vouchers, there remain any surplus, it shall at once be credited on the unpaid installments: Held, that such credit need not be made until it has been ascertained how much of the apparent surplus will be used to defray the cost of collecting the unpaid installments and the loss of interest for the time the money paid remains in the hands of the tax collectors before their settlement with the city.—PEOPLE v. CITY OF CHICAGO, Ill., 38 N. E. Rep. 744.

94. NEGLIGENCE—Imputed Negligence— Pleading.—In an action by a minor, nearly eight years of age, for personal damages, it is not necessary to show that his injuries were sustained without any fault of his parents contributing thereto; the negligence of his custodian not being imputed to a child having capacity to exercise discretion in its own behalf.—LOUISVILLE, N. A & C. RY. CO. v. SEARS, Ind., 38 N. W. Rep. 887.

95. NEGLIGENCE — Turnpike Company — Defective Bridge.—A turnpike company is not liable for an accident occurring on its bridge; if this was properly maintained to safely accommodate the travel on the turnpike road, and the injury was caused by the accidental displacement of a single plank, of which the company had no notice, and could not by the exercise of reasonable diligence have known.—WASHINGTON, C. & A. TURNPIKE v. CASE, Md., 30 Atl. Rep. 571.

96. NEGOTIABLE NOTE—Recital of Consideration.— The recital in a note that it was given for rent does not charge a purchaser with notice of a possible failure of consideration by the maker's eviction on foreclosure of a mortgage on the land leased.—ADOUE v. TANKERSLEY, Tex., 28 S. W. Rep. 346.

97. PRINCIPAL AND AGENT — Unauthorized Acts of Agent.—Where an agent, whose authority is limited to the taking of orders for future delivery, without the knowledge of his principal receives in payment of goods sold chattels which he appropriates to his own use, the principal is not liable for the chattels, nor bound to deliver the goods ordered until they are paid for.—SIOUX CITY NURSERY & SEED CO. v. MAGNES, Colo., 38 Pac. Rep. 330.

98. PRINCIPAL AND SURETY— Contractor's Bond Release of Sureties.—Payments by the owner of a building to a contractor thereon in excess of the percentage provided for in the contract, and without the consent of the sureties on the contractor's bond, release the sureties.—EVANS v. GRADEN, Mo., 28 S. W. Rep. 439.

99. PRINCIPAL AND SURETY—Release.—An agreement whereby a principal debtor is granted further time to pay his note will not release a surety thereon unless said agreement is supported by a valuable consideration.—BENSON v. PHIPPS, Tex., 28 S. W. Rep. 359.

100 PROCESS—Service on Foreign Corporation.—Sand. & H. Dig. § 1323, requires a foreign corporation, before carrying on business, to file with the secretary of State a certificate designating a citizen of this State on whom service of process may be made, and makes such service sufficient to give jurisdiction over the corporation to all courts of the State: Held, that a return of service of summons in an action against a foreign corporation, which shows that it was made on its agent in a county other than that in which the action was begun, and which fails to show that he has been designated as prescribed, fails to show a service sufficient to authorize a judgment by default.—SOUTHERN BLD. & LOAN ASS'N OF KNOXVILLE v. HALLUM, Ark , 28 S. W. Rep. 420.

101. RAILROAD COMPANIES—Crossing—Instructions.— It was proper to refuse to charge that "if plaintiff, by stopping at a point 40 or 50 feet distant from the crossing, and looking and listening, could have discovered the train he collided with, and did not do so," to find for defendant, such instruction taking from the jury the question of contributory negligence.—LAKE SHORE & M. S. RY. CO. v. ANTHONY, Ind., 38 N. E. Rep. 831.

102. RAILROAD COMPANIES — Injury to Person on Track.—There being no distracting danger, and no obstruction to interfere with his view, the deceased was clearly guilty of contributory negligence in going on the track in front of an approaching locomotive, which he could have seen if he had looked before he stepped on the railroad tracks. The motion for a nonsuit should have been granted.—DELAWARE, L. & W. R. CO. v. HEFFERAN, N. J., 30 Atl. Rep. 578.

103. RAILROAD COMPANY—Killing Stock.— As a railroad company is not required to fence its tracks at stations, it is not liable for cattle killed on its track within the depot grounds, unless its servants are guilty of negligence.—GULF, C. & S. F. RY. CO. v. OGG, Tex., 28 S. W. Rep. 348.

104. RAILROAD COMPANIES—Signals—Crossings.—Rev.

St. art. 4232, requiring trains to give certain signals at least 80 rods from the place where the railroad shall "cross" any public road, and also to stop in approaching a place where two railroads "cross," and amending Act Feb. 7, 1853, requiring the ringing of the bell or blowing of the whistle "until the road or street was crossed," applies only to crossings at grade. —MISSOURI, K. & T. RY. CO. v. THOMAS, Tex., 28 S. W. Rep. 343.

105. REAL ESTATE AGENT — Commissions.—Plaintiff who had contracted with a real estate agent to cooperate with him in selling to a third person certain property, with knowledge that such person was willing to purchase at a certain sum, induced the owners to sell for less, so that he could make the difference: Held, that he could not recover from the real estate agent his agreed proportion of the commissions.—TALBOTT v. LUCKETT, Md., 30 Atl. Rep. 564.

106. REAL ESTATE AGENTS—Commissions. — To deprive a real estate broker of his commission for the sale of certain coal lands, on the ground that money was also furnished the claimant thereto to procure a title from the government for the benefit of others, contrary to law, it must be shown that he was aware of that fact at the time, or had sufficient notice to put him upon inquiry.—WALSH v. HASTINGS; Colo., 38 Pac. Rep. 324.

107. RES JUDICATA.—Where one of the cotenants is made the only party to a proceeding to condemn land, the county cannot recover from him, in a direct action for money had and received, a portion of the money paid him as damages, on recovery of judgment against it by the other cotenants.—NEW MADRID COUNTY v. PHILLIPS, Mo., 28 S. W. Rep. 321.

108. SALE — Negligence of Shipper.—In an action on an accepted draft on the consignment of a car load of fruit it appeared that the consignor shipped the fruit during the sold season in a common box car, and the fruit was frozen in transit; that consignor could have shipped the fruit in a refrigerator car, so as to prevent freezing, and that consignee did not know the condition of the fruit when he accepted the draft: Held, that the consignor was negligent in so shipping the fruit and could not recover its value.—WILSON v. WESTERN FRUIT CO., Ind., 38 N. E. Rep. 827.

109. SALE OF LAND — Rescission by Purchaser.—A manufacturing company contracted for a *bonus* to build its plant on a land company's land, and to maintain it there for a certain time. To raise the *bonus* the land company sold lots, conditioned on the plant being located on certain ground: Held, that the lot purchasers were not parties to the contract requiring the maintenance of the plant for a certain time, so as to authorize them to rescind the purchases in case the plant was abandoned after construction.—LEWIS v. BROOKDALE LAND CO., Mo., 28 S. W. Rep. 324.

110. SALE—Vendee's Right to Possession.— Upon a contract for the sale of goods for cash, payment and delivery are concurrent acts, and payment of the purchase money is a condition precedent to the purchaser's right of possession of the goods. The fact that a third party has attempted to garnish the purchase money in the hands of the vendee cannot alter the contract of the parties.—SANBORN v. SHIPHERD, Minn., 63 N. W. Rep. 1089.

111. SPECIFIC PERFORMANCE — Parent and Child.—A parol agreement between father and son for the conveyance of land will not be specifically enforced after the death of both of them, where the only evidence of the agreement consists of rambling and fragmentary conversations occurring years before the trial.—SHOVERS v. WARRICK, Ill., 38 N. E. Rep. 792.

112. TAX DEED—Title Acquired.—Plaintiff's deed contained a re-ervation to defendant's predecesors in title of all timber on a certain described tract. The timber was taxed as part of the land, and the whole property was sold for taxes, and plaintiff bought the tax title from the purchaser at the tax sale: Held, that plaintiff did not acquire title to the timber by such purchase.—GATES v. LINDLEY, Cal., 38 Pac. Rep. 311.

113. TRIAL — Misconduct of Jury.—An affidavit by counsel as to a statement to him by a juror will not be received to impeach a verdict.—RICHARDS v. RICHARDS, Colo., 38 Pac. Rep. 323.

114. TRUST—Equity.—A promise by a devisee to pay a debt of the testator out of his devise or its proceeds is not sufficient to impress the devised property with a trust for the payment of such debt.—HAMILTON v. DOWNER, Ill., 38 N. E. Rep. 733.

115. TRUST—Express Trust—Action on Bond.—On the death of the trustee of a fund devised to a college, the Circuit Court appointed a trustee, who gave a bond to the curators of the college. Afterwards the court passed an order revoking such appointment, and appointing H: Held, that under Rev. St. 1889, §§ 1990, 1991, providing that a trustee of an express trust may sue in his own name without joining the person for whose benefit the suit is prosecuted, H could sue in his own name on the bond of his predecessors given to such curators. — HITCH v. STONEBRAKER'S ESTATE, Mass., 28 S. W. Rep. 443.

116. TRUST — Payment to Trustee — Negligence. — Where one pays money to a trustee, whom he knows to be on the verge of insolvency, with the expectation that he will appropriate it for his own use, he cannot, on being appointed trustee in the other's place, recover the lost funds from the insolvent's cotrustee, but he is liable therefor himself.—DARNABY v. WATTS, Ky., 28 S. W. Rep. 338.

117. UNITED STATES SUPREME COURT—Jurisdiction.—Where, in an action in a State court, the parties plead and claim rights under statutes of a foreign State, but the defeated party does not plead the construction given such statutes by the courts of such foreign State, or put in evidence the laws of the printed books of the adjudged cases of such State, or prove the common law of such State by the parol evidence of persons learned in that law, as required by the law of the State where the action is tried, such party cannot appeal from the highest court of the latter State to the Supreme Court of the United States on the ground that such court did not give the full faith and credit to the public acts, records, and judicial proceedings of such foreign State which the constitution and law of the United States require, and that, therefore, a federal question is presented.—LLOYD v. MATTHEWS, U. S. S. C., 15 S. C. Rep. 70.

18. WATERS — Irrigation — Appropriation. — Under Mills' Ann. St. § 2269, the appropriation of water for irrigation from a body of water, not a running stream, collected in a canon, is valid.—DENVER, T. & FT. W. R. CO. v. DOTSON, Colo., 38 Pac. Rep. 322.

119. WILLS—Nature of Estate.—Where land is devised to a wife, "to have and to hold for her comfort and support if she needs the same during her natural life time,"—the will providing for a legacy "if there is enough of my property left at the death of my wife,"—the widow took a life estate, with power to use so much of the *corpus* of the estate as she should need to apply to her comfort and support, and a mortgage for such purpose was valid.—SWARTHOUT v. RANIER, N. Y., 38 N. E. Rep. 726.

120. WILL—Residuary Clause—After-acquired Property.—Testator, after giving certain legacies to some of his children, devised "all" of his land to other children, specially stating of what such land consisted. He then, after directing the payment of his debts out of the "balance of his property," provided that, "should there be anything left," it should go to the children to whom he had given the land: Held, that after-acquired land passed under the latter clause.—WEBB v. ARCHIBALD, Mo., 28 S. W. Rep. 80.

121. WITNESS— Impeachment.—A person whose witness testifies contrary to the way he has been led to believe he would do cannot prove that the witness had made prior statements to the contrary.—IN RE KENNEDY'S ESTATE, Cal., 38 Pac. Rep. 93.